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THE COMMERCE CLAUSE IN THE CONSTITUTIONAL
CONVENTION AND IN CONTEMPORARY COMMENT

By ALBERT S. ABEL*

THIS paper constitutes one instalment of an examination into the historical meaning of the commerce clause of the American constitution. Specifically it seeks by a comprehensive and detailed sifting of the materials from the years 1787 and 1788 to discover what import was originally attributed to the clause by contemporaries actively engaged in the processes of formulation or ratification. There is no intention to suggest that current commerce clause construction, in so far as it may depart from that initially indicated, is to be condemned on that account. In the evaluation of constitutional doctrine, there are other and more important factors to be considered than the "intention of the framers." Yet the latter has its own interest, both intrinsically and as a means of appraising accurately the validity or spuriousness of the claims to the support of that revered authority, which are so often used as substitutes for argument. The writer of this paper is interested only in making it clear what that intention was, so far as regards the commerce clause; the reader is free to draw whatever conclusions he pleases therefrom, or none at all if that suits him better.

THE SCOPE AND CONTENT OF THE GRANTED POWER

RUNNING THE BOUNDARY BETWEEN STATE AND NATIONAL AUTHORITY GENERALLY. It seems to have been common ground that the general government as constituted—or reconstituted—by the convention was to possess *a* power of regulating commerce. It was by no means so universally agreed that there should be a clause granting to it *the* power "to regulate commerce." That depended on the larger preliminary question of the place of Congress and of the general government in the revised political system. Were the states to be reduced substantially to the position of municipal corporations confined to the area of local self-government, and Congress invested with a general legislative power which would require little or nothing in the way of specification?

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Or were the states to be constituent members of a federal system, with an extension of the powers of the general government into enumerated fields (including the field of commercial regulation), not theretofore within its range of action?

Hamilton from New York and Randolph from Virginia prepared plans which looked toward the former and more radical alteration in the existing arrangement. Paterson from New Jersey and Pinckney from South Carolina presented tentative first drafts for a constitution based on a mere re-distribution of existing powers, enlarging and implementing the federal authority but retaining the federal principle.

The Hamilton plan, which was decidedly the most sweeping of all (but which was perhaps never really presented for consideration) provided that "the Legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defence and general welfare of the Union," taking effect, however, only upon and after assent by the president.¹ The Randolph plan, a joint production, apparently, of the Virginia delegation, in the authorship of which Madison may have had a considerable hand,² was less summary and rather less inclusive. It declared

"that the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the confederation and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several states contravening in the opinion of the national legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof."³

Indeed on its face this provision is not inconsistent with the retention of a considerable independent jurisdiction by the states, comparable to that marked out for the Canadian provinces by the

¹³ Farrand, *The Records of the Federal Convention of 1787* (1911) 627. This work is a substantially definitive compilation of the materials respecting the proceedings in the constitutional convention, consisting in the main of the journal of the convention, and the notes of Madison, McHenry, King, and other delegates, made contemporaneously, with a few miscellaneous writings attributable to various delegates. It will hereafter be cited as Farrand, with the addition parenthetically of the source of the particular passage to which reference is made; thus, Farrand (Madison), Farrand (Journal), etc.

²See McLaughlin, *A Constitutional History of the United States* (1935) 152.

³¹ Farrand (Madison) 21.

disallowance clause⁴ and the residuary clause of section 91⁵ of the British North America Act.

The particularity of the other two plans submitted stood in marked contrast. The text of the Pinckney plan has been lost, but, as conjecturally restored, it provided with regard to commerce (disregarding its similarly specific grants of power as to other matters) that Congress should have "the exclusive power, of regulating the trade of the several states as well with foreign nations as with each other—of levying duties upon imports and exports," saving to each state, however, the right to impose embargoes "in time of scarcity."⁶ The Paterson plan represented much the most detailed attempt to define the powers to be given Congress, prescribing, with reference to commerce,

"that the United States in Congress be also authorized to pass acts for the regulation of trade as well with foreign nations as with each other, and for laying such prohibitions, and such imposts and duties upon imports as may be necessary for the purpose; provided, that the legislatures of the several states shall not be restrained from laying embargoes in time of scarcity; and provided further that such imports and duties so far forth as the same shall exceed per centum ad valorem in the imports shall accrue to the use of the state in which the same shall be collected."⁷ A variant of this plan, somewhat simplifying its provisions and linking them more clearly with the revenue system,⁸ was prepared by Sherman of the Connecticut delegation, with whom Paterson

⁴Section 90: "The following provisions of this Act respecting the Parliament of Canada, namely,—the provisions relating to . . . the disallowance of acts, and the signification of pleasure on bills reserved—shall extend and apply to the legislatures of the several provinces as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the legislatures thereof, with the substitution of the lieutenant-governor of the province for the governor-general, the governor general for the Queen and for a secretary of state, . . . and of the province for Canada."

⁵Section 91: "It shall be lawful for the Queen, by and with the advice of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces. . . ." For a good critical summary of the design and scope of this clause, see Kennedy, *The Judicial Process and Canadian Legislative Powers*, (1940) 25 Wash. Univ. L. Q.

⁶3 Farrand 607.

⁷3 Farrand 612.

⁸3 Farrand 615 ("That in addition to the legislative powers vested in Congress by the articles of confederation, the legislature of the United States be authorized to make laws to regulate the commerce of the United States with foreign nations, and among the several states in the union; to impose duties on foreign goods and commodities imported into the United States and on papers passing through the post office for raising a revenue, and to regulate the collection thereof. . . .")

and his Jerseymen worked intimately during the early stages of the convention; as was also a modification of the Randolph proposals.⁹

While our immediate concern is only with the genesis of the commerce power, the matter of commercial regulation was to the delegates a mere detail of application in comparison with two much larger questions: what scope of action should be bestowed upon the contemplated central government? And how far and in what manner should the states' powers be curtailed? For perhaps the majority of the members, the answers were furnished not by maxims of political philosophy but by what appeared to be the interests of the particular states which they were representing. All during this preliminary consideration, the issue between the large states and the small states over whether representation should be by population or by states was coming to a head.¹⁰ While we unfortunately lack any record of the dickerings, side-remarks, dinner table conversations, and tavern talks which must have been going on feverishly, it would be only natural that the large states should wish the most extended powers for the nation and the most restricted zone of state action when it looked as if population was to be the basis for representation and thus for control; and that their enthusiasm should take the opposite turn when the concession of equal representation of states in the Senate had diminished that potentiality of control. And this is precisely what the record shows. Thus, Randolph is found, after the July recess from which the compromise of equal representation in the Senate emerged, opposing a definition of federal legislative powers based upon, and not substantially differing in language from the provisions in the plan which he had sponsored.¹¹ Gouver-

⁹ Farrand 616 ("To make laws binding on the people of the United States, and on the courts of law, and other magistrates and officers civil and military, within the several states, in all cases which concern the common interests of the United States; but not to interfere with the government of the individual states, in matters of internal police which respect the government of such states only, and wherein the general welfare of the United States is not affected.")

¹⁰ See McLaughlin, *Constitutional History of the United States* (1935) chapter XIV, especially at pp. 162, 163.

¹¹ See 2 Farrand (Madison) 26, 27. It was agreed by both Randolph and Bedford that the new matter added by the latter in moving the amended resolution made no change of substance, the former characterizing it as "superfluous being included in the first," the latter arguing in its support that "it is not more extensive or formidable than the clause as it stands." Randolph had been quite explicit in his remarks on the preceding day, July 16, on the significant effect of the decision as to representation, see 2 *id.* (Madison) 17 ("Mr. Randolph. The vote of this morning (involving an equality of suffrage in the second branch) had embarrassed

neur Morris, who had shown a cheerful readiness to obliterate the states,¹² becomes wary of allowing the central government a veto over state legislation.¹³ Conversely, Bedford of Delaware, who had been outspoken in behalf of the claims of the smaller states,¹⁴ is seen moving the adoption of the Randolph-plan grant of congressional authority,¹⁵ which its author disowned.

This dependence of constitutional doctrine upon practical politics, so patently present yet so obscurely traceable in particulars, renders necessary the utmost caution, in the consideration of utterances on the basic general problems of the proposed scope of enlargement of federal authority and diminution of state powers. Yet, unsatisfactory as the materials are, they must be at least cursorily examined as a basis for any genuine understanding of what was effected by the grant of power over commerce. When it came, it was but one of a group of powers bestowed on Congress. Its content and operation cannot legitimately be appraised without an examination of the class characteristics of the powers designed to be granted; and, as the convention itself did, we must settle the meaning of the co-ordinated whole before we can fruitfully turn to the particular power.

On May 29, 1787, the convention really commenced its work. The plan of the Virginians was presented by Randolph, and then Pinckney introduced his. In the interest of informality and flexibility, the convention acted principally in committee of the whole, in its early stages. As such, it proceeded to take up first¹⁶ the Randolph proposals severally, for the purpose of determining which of them to put on its tentative agenda for more formal consideration and definite disposition thereafter. On May 31, it reached that part of the proposal having to do with the legislative

the business extremely. All the powers given in the report from the Come. of the whole, were founded on the supposition that a proportional representation was to prevail in both branches of the legislature—When he came here this morning his purpose was to have offered some propositions that might if possible have united a great majority of votes, and particularly might provide against the danger suspected on the part of the smaller states. . . .")

¹²¹ Farrand (Paterson) 556 (G. Morris—"We must have it in view eventually to lessen and destroy the state limits and authorities.")

¹³ See 2 Farrand (Madison) 28.

¹⁴¹ Farrand (Madison) 167; *id.* (King) 172.

¹⁵² Farrand (Madison) 26, 27.

¹⁶ There is no record that the Pinckney proposals ever were formally considered by the committee of the whole; apparently, the assent to the Randolph plan as a basis of discussion was felt, by reason of the different basis on which the two proceeded, to have disposed of the former, which were dropped by common consent or perhaps refined into the Paterson plan.

powers to be given Congress. The concession of the powers exercised under the articles of confederation (which, in the main, have no significant connection with the commerce power) provoked no opposition. The provisions with reference to the negating of state statutes (consideration of which may more appropriately be postponed at this point) were not reached until June 8. There remained the power to legislate "in all cases to which the separate states are incompetent" or "in which the harmony of the united states may be interrupted by the exercise of individual legislation." The committee voted to include both of these as a basis for future action,¹⁷ the former after considerable discussion by affirmative vote of nine states, with one, Connecticut, divided, and none opposed,¹⁸ the latter without discussion or dissent.¹⁹ The proposals remained in this identical form on June 13, when the convention completed its preliminary item-by-item consideration of the Randolph plan and reduced the results of its labors to a tentative draft, for elaboration into a constitution.²⁰ Two days later, Paterson presented the plan bearing his name,²¹ which the New Jersey delegates, in connection with some others from the smaller states, had been working out as a suggested alternative to the Virginia-inspired system. The next week was occupied with extensive discussion and final rejection of the New Jersey plan, the convention adhering to that of Randolph as the foundation for further action. On July 16, the section of the report from the committee of the whole having to do with legislative powers was reached for action by the convention as such, the immediate issue being that of reference of its provisions to the committee of detail.²² An effort the next day, by Sherman of Connecticut, to substitute, for the phraseology quoted,²³ a provision empowering Congress to

"make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the government of the individual states in any matters of internal police which respect the government of such states only, and wherein the general welfare of the United States is not concerned"

¹⁷¹ Farrand (Journal) 47.

¹⁸¹ Farrand (Madison) 53, 54.

¹⁹¹ Farrand (Madison) 54.

²⁰¹ Farrand (Journal) 225; *id.* (Madison) 236.

²¹¹ Farrand (Madison) 243.

²²² Farrand (Madison) 17.

²³³ *Supra*, text and note 17.

was defeated by a vote of eight states to two.²⁴ By a like vote, the convention referred to the committee of detail a provision, submitted by Bedford, granting Congress power of legislation "*in all cases for the general interests of the Union*, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."²⁵ Thus the delegates had twice approved, once as a committee of the whole and once as a convention, schemes which spoke in terms of legislative incompetence of the states, of disturbances of harmony between the states, and—on the final submission—of furtherance of the general interests of the union. They had rejected, once tacitly, in ignoring the Pinckney plan, and again expressly, in their disposition of the Paterson proposals, naked grants of enumerated powers unaccompanied by a declaration of standards appropriate for the determination of their scope and reach, as well as Sherman's proposed amendment spot-lighting the retained jurisdiction of the states. The action taken seems significant, especially since (as will appear later) the report of the committee on detail, and ultimately the constitution, did specify a number of the individual powers—and, of particular interest to us, the commerce power—which were contained in the rejected plans.

That significance is demonstrated when a consideration of the discussions and expressions of opinion concerning the action taken is added to the naked record of the proceedings themselves. The want of precision in the expression, "cases to which the separate states are incompetent," troubled a number of the delegates at the very outset. Pinckney and Rutledge called attention to its vagueness and expressed doubt as to how to vote "until they should see an exact enumeration of the powers comprehended by this definition"; Butler "called on Mr. Randolph [sic] for the extent of his meaning;"²⁶ Sherman felt that the provision was too indefinitely expressed, but recognized the difficulty involved in undertaking "to define all the powers by detail."²⁷ These charges of indefiniteness were not denied, as indeed they hardly could be. Wilson took the ground that it was impossible to enumerate the

²⁴2 Farrand (Madison) 25, 26; see 2 Farrand (Journal) 21. This was in substance a re-presentation of the Connecticut contribution to the rejected Paterson plan, quoted *supra* n. 9.

²⁵2 Farrand (Madison) 26. The italics (supplied) indicate the respect in which the language in the reconstituted Bedford proposal was an amendment of and addition to that in the original Randolph plan.

²⁶1 Farrand (Madison) 53.

²⁷1 Farrand (Pierce) 60.

powers appropriate for the federal government.²⁸ Madison tended to the same position, stating that

"he had brought with him into the convention a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national legislature; but had also brought doubts concerning its practicability. His wishes remained unaltered; but his doubts had become stronger. What his opinion might ultimately be he could not yet tell."²⁹

This implied that the terms tentatively under consideration were, or might be, substantially those designed to be incorporated in the constitution. Randolph himself did not think of them in that way; he envisaged his plan less as a rough draft of the constitution than as the outline within which a constitution should be elaborated. "Details made no part of the plan and could not perhaps with propriety have been introduced;"³⁰ and he "disclaimed any intention to give indefinite powers to the national legislature,"³¹ and limited his opposition to the request for specification to stating his view that it was impossible "just at this time."³² This approach was echoed by several of his colleagues, who expressed the sentiment that the important thing immediately to be done was to establish general principles as a point of departure for subsequent detailed action; there would be time enough later to work out the particulars within the frame of reference provided by the more general provisions.³³ Against the background of this discussion, and in the light of these explanations, the committee of the whole placed the resolutions concerning legislative power in the agenda, for consideration by the convention proper.

There was a repetition of this whole discussion in rather briefer form when, in due course, the convention reached this part of the committee's proposals. Butler reiterated his objection as to vagueness; Gorham replied, "The vagueness of the terms constitutes the propriety of them. We are now establishing general

²⁸ Farrand (Pierce) 60.

²⁹ Farrand (Madison) 53.

³⁰ Farrand (Madison) 51.

³¹ Farrand (Madison) 53.

³² Farrand (Pierce) 60.

³³ Farrand (Pierce) 60. The following extract shows the attitude taken: "Mr. Madison said it was necessary to adopt some general principles on which we should act—that we were wandering from one thing to another without seeming to be settled in any one principle. Mr. Wythe observed that it would be right to establish general principles before we go into detail, or very shortly gentlemen would find themselves in confusion, and would be obliged to have recurrence to the point from whence they set out. Mr. King was of opinion that the principles ought first to be established before we proceed to the framing of the act. . . ."

principles, to be extended hereafter into details which will be precise and explicit;" and then the matter came definitely to a head with a motion, by Rutledge, that the clause be committed for a specification of the powers comprised in the general terms, which was defeated by an equal division of the vote.³⁴

The sense of the convention seems clear enough. The evident purpose was to give power over neither a congeries of independent unrelated subjects, nor yet over some misty and uncertain area of undefined extent, but over a class of subjects, whose members remained to be specified but which possessed the common characteristics referred to in the resolution as it went to the committee of detail: that is to say, where the general interests of the union were concerned, where the individual states lacked the capacity for effective action, or where state legislation constituted an appreciable interference with the conditions making for good relations between the several states. A standard was furnished and items were to be supplied. The congressional power was to operate neither over the whole extent of the subjects falling within the standard in disregard of the (as yet unformulated) items, nor to the utmost extreme of the literal meaning of any particular item, in disregard of standard, but rather within the double limitation of standard and item.

This conclusion is buttressed by remarks of members on other occasions, and in connection with other subjects, than the disposition to be made of the legislative-power planks of the Randolph plan. Notably at the time of the struggle to substitute the Pater-son proposals, attention was directed to the content of the authority being given the federal government. Hamilton voiced the opinion that Congress ought to have "indefinite" authority;³⁵ the notion was consistent with the strong centralizing attitude that he took throughout the period of his attendance at the convention, but his extreme position won little concurrence and represents the expression of an individual and unsuccessful point of view. James Wilson, speaking in favor of the Randolph, and against the Pater-son plan, analyzed fully and in great detail the contrast between their respective provisions. On the subject of the grant of legislative authority, his own notes, evidently constituting a summary of the heads of the speech to be made, contrast the two mainly by setting forth the substance of the Virginia resolutions

³⁴² Farrand (Madison) 17.

³⁵¹ Farrand (Madison) 324.

and summarizing those from New Jersey as bestowing added powers on Congress "in a few inadequate instances."³⁶ The address must have struck his colleagues as particularly impressive since an unusual number of them made notes of his remarks, abstracting the points made by him, in their own language. While the expressions employed by them cannot be attributed with any positiveness to Wilson as expressing his views of the powers conferred, they do show, at any rate, the impression which his colleagues received of his views—or, perhaps, by subconscious identification of his statements with their own interpretations, what was their understanding of the content of the grant. Madison set forth the contrast between the two³⁷ in almost identical terms with those which appear in the Wilson notes,³⁸ thus lending some weight to the supposition that Wilson adhered rather closely to the expressions therein contained, and that the more condensed abstracts of other delegates were, in this particular, paraphrases rather than quotations. Both Yates³⁹ and King⁴⁰ accredit him with the view that, under the Virginia plan, the Congress might legislate as to "national" cases or concerns, while Hamilton⁴¹ summarizes him as stating that it is to have such power "in all matters of general concern." Under the New Jersey plan, by way of contrast, Yates understood Wilson as saying the Congress may act "only on limited objects,"⁴² King that it may legislate in "enumerated and partial instances,"⁴³ and Hamilton that its power would extend only to "partial objects."⁴⁴ Whatever the exact language that he may have used, clearly Wilson succeeded in conveying to his colleagues the impression that the contrast was one between the prescription of a standard and the specification of items—between "national" or "general" "cases" or "con-

³⁶1 Farrand (Wilson) 277 ("Propositions—from Virginia . . . 6. The national legislature to legislate in all cases to which the state legislatures are incompetent, or in which the harmony of the Union may be interrupted.—from New Jersey . . . 6. The United States in Congress vested with additional powers only in a few inadequate instances.")

³⁷1 Farrand (Madison) 252 ("Mr. Wilson entered into a contrast of the principal points of the two plans. . . . These points were . . . 6. the natl. legislature is to make laws in all cases to which the separate states are incompetent & —:— (in place of this) Congs. are to have additional power in a few cases only.")

³⁸Compare the phraseology set forth in notes 36 and 37, *supra*.

³⁹1 Farrand (Yates) 261.

⁴⁰1 Farrand (King) 265.

⁴¹1 Farrand (Hamilton) 269.

⁴²1 Farrand (Yates) 261.

⁴³1 Farrand (King) 265.

⁴⁴1 Farrand (Hamilton) 269.

cerns," and "limited," "enumerated," or "partial" "instances" or "objects."⁴⁵ The same thought recurs in Ellsworth's description of the appropriate sphere for federal action as being limited to "objects of a general nature."⁴⁶

SPEAKING OF "COMMERCE." Our concern so far has been with the mental climate prevailing at the time and place when the commerce clause was written, with the assumptions they were making and the way they were thinking as to the general framework of the new system. It seems plain enough that the to-be-enumerated heads of federal power were conceived in terms of class membership, the common or class characteristic being the national or general bearing of the legislative actions of the new federal government. Henceforth inquiry may focus more sharply on the commerce power as such.

In pursuing that inquiry, reference to a wider range of materials becomes legitimate. The query, upon what postulates was the power over commerce written into the constitution, can only be dealt with authoritatively upon the evidence afforded by the proceedings and discussions of the convention prior to its incorporation and, to a lesser extent, by subsequent statements of the delegates, bearing on it.⁴⁷ But the problem, given the clause, what meaning did it convey to those with whom the ultimate fate of the new organic instrument rested, need not be solved

⁴⁵According to one account, Luther Martin would seem to have expressed a view similar to that of Wilson, inasmuch as he was willing to concede the federal government's power to legislate "in cases of general interest," see 1 Farrand (Yates) 439. However, another report of the same address represents him as saying, "whatever is of an external and merely general nature shall belong to the U. S.," and as stating his concurrence in the propriety of federal legislation as to objects of "external" (rather than general) nature, See *id.* (King). The difference is, of course, substantial.

⁴⁶1 Farrand (Madison) 492.

⁴⁷See, e.g., the letter of Sherman and Ellsworth transmitting the draft of the proposed constitution to the governor of Connecticut, 3 Farrand 99; Madison's letter of October 24, 1787, to Jefferson, *id.* 131; Wilson's remarks in the Pennsylvania ratifying convention, *id.* 139, 140; the account of a conversation with Abraham Baldwin noted in the diary of Ezra Stiles under date of December 21, 1787, *id.* 168-9; letter by Madison to John Tyler, *id.* 526-7 (all reinforcing the conclusions heretofore drawn as respects the legislative jurisdiction intended to be given the states and the nation respectively, particularly on the suggested distinction between matters of local, and those of national or general concern.) The Tyler letter is especially full in its reference to the design of using the Randolph plan as a standard to be amplified into particulars. See also on this point, Madison in Number 10 of the *Federalist* (Everyman's ed.) 146; Ellsworth in the fourth number of *The Letters of a Landholder*, reprinted in Ford, *Essays on the Constitution of the United States*, especially at 153; Sherman in the second number of *The Letters of a Citizen of New Haven*, reprinted at *id.*

upon any such restricted information. The delegates deliberating or declaiming in the several state conventions assembled to consider ratification, the eager pamphleteers who busied themselves in influencing or attempting to influence the opinion of those delegates or of the electorate engaged in choosing them, are as good and as contemporary witnesses in that connection as are the framers themselves. Accordingly, all these scattered rays of light may be united into a single beam, and the spectrum analysis of the contemporary understanding of the content of the grant made from that rather than from the separate components independently.⁴⁸

Among the first things that strikes one on going through the mass of materials dealing with the formation and adoption of the constitution is the nearly universal agreement that the federal

⁴⁸Farrand will be cited in the same manner as heretofore. Other collections of source material to which frequent reference will be made are:— (1) Elliott, *Debates of the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1836); (2) Ford, *Pamphlets on the Constitution of the United States* (1888); (3) Ford, *Essays on the Constitution of the United States* (1892); (4) *The Federalist* (Everyman's ed.); (5) McMaster & Stone, *Pennsylvania and the Federal Constitution* (1888). (1) will be cited Elliott, ordinarily accompanied by information, in the text or the note, as to the particular ratifying convention in which the statement referred to was made, and by whom. In (2) the following pamphlets have been found to have some relevance on the meaning of the commerce clause:— Noah Webster, *An Examination into the leading principles of the Federal Constitution, By a Citizen of America*; John Jay, *An Address to the People of the State of New York on the Subject of the Constitution* (signed) a citizen of New York; Melancthon Smith, *An Address to the People of the State of New York: Showing the necessity of Making Amendments . . . By a Plebeian*; Tench Coxe, *An Examination of the Constitution for the United States of America, By an American Citizen*; John Dickinson, *The Letters of Fabius*; Alexander Cteee Hanson, *Remarks on the Proposed Plan of a Federal Government, By Aristides*; Edmund Randolph, *Letter on the Federal Constitution*; Richard Henry Lee, *Letters from the Federal Farmer to the Republican*; George Mason, *The Objections of the Hon. George Mason to the proposed Federal Constitution*; James Iredell, *Answers to Mr. Mason's objections to the new Constitution by Marcus*; David Ramsey, *An Address to the Freemen of South Carolina on the subject of the Federal Constitution* (signed) *Civis*; they will be cited *Pamphlets*, followed by the name of the author, thus, *Pamphlets* (Jay). In (3) the following throw light on the commerce clause:—James Winthrop, *Letters of Agrippa*; Hugh Williamson, *Remarks on the New Plan of Government*; Luther Martin, *Letters to the Maryland Journal*; George Clinton, *The Letters of Cato*; Roger Sherman, *The Letters of a Citizen of New Haven*; Oliver Ellsworth, *The Letters of a Landholder*; Robert Yates, *The Letters of Sydney*; and will be correspondingly cited, as *Essays*, with appropriate attribution of authorship, e.g. *Essays* (Yates). (4) will be cited *Federalist* with an indication of the conjectural authorship, thus, *Federalist* (Madison). (5) will be cited McMaster, with notation ordinarily made of the author of the remarks referred to and the manner or circumstances in which they were made; materials from chapter VII, composed of a pamphlet, *The Letters of Centinel*, will be cited McMaster (Centinel).

government should be given the power of regulating commerce. The proponents of the new system consistently dwelt on the lack of such power as one of the chief circumstances which had rendered needful a re-constitution of the federal arrangement,⁴⁹ and on its grant as being a major and indubitable boon of union.⁵⁰ They stressed the point that every one was in agreement as to the merit of this feature of the constitution,⁵¹ and they seem to have been stating a fact. In the convention itself, that part of the report from the committee of detail which gave power to regulate commerce "with foreign nations, and among the several States" was agreed to without dissent,⁵² as was the later incorporation into the clause of the power over Indian trade.⁵³ In the ratifying conventions, the same lack of opposition is disclosed. Even in those of them where the struggle over ratification was severest, indeed in those which refused their adherence, there was no proposal to strike from the congressional powers that of regulating commerce, which seems rather to have been acquiesced in *semper*

⁴⁹See the remarks in the federal convention of Madison, 1 Farrand (Yates) 535; the expressions in the letter accompanying transmission of the proposed constitution to Congress, in Gouverneur Morris' handwriting, 2 id. (Journal) 583, and in the copy signed by Washington as president of the convention, 2 id. 666; the letter sent by the merchants of Rhode Island to the federal convention, 3 id. 16; Madison's letter dated 1832 to Professor Davis, 3 id. 519; and the holograph memorandum by Madison, 3 id. 547; Randolph's letter to the speaker of the Virginia house, 1 Elliott 486; the remarks in the Massachusetts convention of Dawes, 2 id. 56, 57, Gorham, 2 id. 106-7, and Bowdoin, 2 id. 129; in the North Carolina convention of Davie, 4 id. 19; in the South Carolina legislature of Charles Pinckney, 4 id. 253-4; in the Pennsylvania convention of Yeates, McMaster 297; and for similar expressions in the periodical and pamphlet literature, see Pamphlets (Jay) 72, 73; id. (Randolph) 264-7; Essays (Ellsworth) 140-1; Federalist, No. 22 (Hamilton) 102; id. No. 42 (Madison) 214.

⁵⁰In addition to the references in the preceding note, see the remarks in the Massachusetts convention of Sam Adams, 2 Elliott 124, and of Russell, 2 id. 139; in the Pennsylvania convention of McKean, 2 id. 541-2, McMaster 379, and of Rush, McMaster 300; and in the Virginia convention of Pendleton, 3 Elliott 295; also the comments in Pamphlets (Ramsey) 376-7; Essays (Sherman); Federalist, No. 23 (Hamilton) 111; id. No. 11 (Hamilton) 48 ff.

⁵¹See the remarks in the federal convention of Randolph, 1 Farrand (Yates) 263, of Wilson, id. (Yates) 413, and of Charles Pinckney, 3 id. 116; in the New York convention of Robert Livingston, 2 Elliott 214, 384; in the Virginia convention of Madison, 3 id. 260; in the Pennsylvania convention of McKean, McMaster 275; and the comments set forth in Essays (Williamson) 401; Federalist, No. 11 (Hamilton) 48; id. No. 22 (Hamilton) 102; id. No. 40 (Madison) 199; id. No. 45 (Madison) 238. Randolph notes it as the unanimous view of the delegates to the earlier Annapolis convention, of whom he was one, 3 Elliott 26.

⁵²2 Farrand (Madison) 308; see id. (Journal) 304.

⁵³2 Farrand (Madison) 499; see id. (Journal) 495, (McHenry) 503.

omnibus et ubique as an appropriate matter for federal control.⁵⁴ Yates, one of the dissident New York delegates, hinted at vague sinister consequences which might follow from its adoption.⁵⁵ A Massachusetts pamphleteer proposed an amendment withdrawing the power over interstate commerce from Congress;⁵⁶ and a South Carolina legislator took a sarcastic jab at the clause,⁵⁷ the opposition of the latter two being grounded on considerations which will become more fully apparent later. But, for the most part, the severest critics of the constitution expressly disclaimed any hostility to this particular feature of the new system⁵⁸ and bore testimony that, be the blemishes in other respects what they might, this particular grant of authority was a good and wholesome provision and had their approval.⁵⁹ True enough, as we shall see, certain exceptions and qualifications as to the exercise

⁵⁴Thus, the section is noted at 3 Elliott 378, as having been read in the Virginia convention, but the ensuing remarks on the section make no mention whatever of the commerce clause portion of it; in 4 id. 94, the second (commerce) to eighth clauses of the section are noted as having been read "without objection" in the North Carolina convention. See Foster, *Minutes of the Rhode Island Convention* (ed. Cotner, 1929) 47, under date March 3 ("8th section of the constitution read—and now under Consideration—no objection made . . .") The two latter states were the only ones which rejected the constitution on its initial submission.

⁵⁵Essays 302 ("If this (asserted usurpation on state control of Indians, under provisions for regulating Indian trade in article 9 of the Articles) was the conduct of Congress and their officers, when possessed of powers which were declared by them to be insufficient for the purposes of government, what have we reasonably to expect will be their conduct when possessed of the powers 'to regulate commerce with foreign nations, and among the several states and with the Indian tribes', when they are armed with legislative, executive, and judicial powers, and their laws the supreme laws of the land.") But cf. joint statement with Lansing, cited *infra*, n. 59.

⁵⁶See Essays (Winthrop) 118; but cf. statements of the same writer noted *infra* n. 58.

⁵⁷See the remarks of Lowndes, 4 Elliott 273, 288.

⁵⁸See the observations in the New York convention of Lansing, 2 Elliott 218; in the North Carolina convention of Bloodworth, 4 id. 70; and Wilson's notes of remarks of Findlay in the Pennsylvania convention, McMaster 770; also the address of the minority of the Pennsylvania house of representatives, opposed to calling a convention, id. 78, 79, and of the minority of that convention, opposed to ratification, id. 455-6; and among contemporary writings, id. (Centinel) 604, Pamphlets (Lee) 281, Essays (Winthrop) 61. Sometimes this approval was accompanied with the comment that, while unobjectionable in itself, the grant of power would not be followed by all the anticipated benefits (see the remarks of Grayson in the Virginia convention, 3 Elliott 280, and the comment in Pamphlets (Smith) 107) or that it would be proper "under certain limitations" (see Essays (Winthrop) 70, 79-80).

⁵⁹See the joint letter of Yates and Lansing to the Governor of New York, 3 Farrand 246; the remarks in the federal convention of Luther Martin, 4 id. 23; in the Massachusetts convention of General Thompson, 2 Elliott 80; in the Virginia convention of Monroe, 3 id. 214, of Grayson, 3 id. 278, and of Tyler, 3 id. 641; and the comments in McMaster (Centinel) 594, 616.

of the power were proposed, both in the Philadelphia convention and thereafter. But the provision in its general substance was everybody's darling.

This remarkable consensus suggests that for all concerned the provision had some common core of meaning, that it was understood as supplying some manifest defect in the existent congressional powers under the confederation. At the same time it militated against the conscious articulation of that meaning, there being no need to elaborate what all understood and none opposed. The upshot is that if we, today, who live in the shadow of their handiwork, would know the connotations to them of the grant, we must seek it in the extant records of the time rather than in current dictionaries, since the weathering of cultures produces corresponding erosion of or accretion to the phrases in which they express themselves. But we must seek it obliquely, through the context in which language was used, since of explicit formulation there is very little.

(a) THE CUSTOMS AND REVENUE ASPECT. The fiscal aspect of commercial regulation was an incessantly recurring phase throughout the discussion. Sometimes the form taken was that of the intimate linking of concepts exemplified in Sherman's advocacy, in the early days of the convention, of giving the federal government "powers to regulate comerce [sic] and draw therefrom a revenue,"⁶⁰ sometimes the more concrete and explicit integration expressed, on the very first day the Philadelphia convention started functioning, in Randolph's complaint of the inability of congress to establish an impost.⁶¹ Under the first approach, the intimate relation of commercial regulations and of revenue is stressed by means of the proximity of mention. Under the second, their combination, in the particular area of customs regulation, is actually made the whole basis for a generalized consideration of commercial regulation. The frequency with which both appear manifests the prevalent preoccupation with this special segment of the commerce field.

With the first form, the simple juxtaposition of language, all that can be done, for the most part, is to direct attention to the many instances of its employment.⁶² No single specimen of such

⁶⁰1 Farrand (King) 143.

⁶¹1 Farrand (Madison) 19; id. (McHenry) 25.

⁶²Federalist, No. 40 (Madison) 199 ("Was it not an acknowledged object of the convention and the universal expectation of the people that the regulation of trade should be submitted to the general government in such

usage is entitled to any great weight, but the repeated association of commercial provisions and revenue provisions in speech betokens a probable like association in thought. Particular interest attaches to a few instances, however—for instance, the fusion of commercial and fiscal provisions in a single section in the Pinckney plan,⁶³ and their curiously indiscriminate blending in the fragments of the holograph notes of the members of the committee of detail.⁶⁴ One should also note the full and systematic elaboration of the inter-relations between commercial regulation and revenue arrangements presented by Hamilton as the subject matter of one entire number of the *Federalist*.⁶⁵

a form as would render it an immediate source of general revenue?" Other illustrations may be found in the remarks in the federal convention of Hamilton, 1 Farrand (Yates) 329, of King, id. (Madison) 198, and of Mason, 2 id. (Madison) 344; the expressions at the beginning of the letter transmitting the proposed constitution to the congress of the Confederation, 2 id. (Journal) 583, 666; in the letter of Carrington to Jefferson, 3 id. 39; of Charles Pinckney in his *Observations on the Plan of Government*, 3 id. 118; of McHenry addressing the Maryland House of Delegates, 3 id. 149; of Yates and Lansing apprising the Governor of New York of their reasons for non-signature, 3 id. 246; the Sherman proposals in formulating the Paterson plan, 3 id. 615; of Hamilton in the New York convention, 2 Elliott 350; of Madison, 3 id. 255, and Grayson, 3 id. 277, in the Virginia convention; and of Findlay in the Pennsylvania convention (as summarized in Wilson's notes), McMaster 770. Of the campaign writings, see McMaster (Centinel) 570-1, Pamphlets (Webster) 62, 63, id. (Smith) 107, Essays (Williamson) 401, id. (Ellsworth) 193, *Federalist*, No. 62 (Hamilton or Madison) 319. The proposed amendment, never adopted, of Gouverneur Morris for establishing a council of executive ministers and prescribing their respective duties, named the "Secretary of Commerce and Finance" as one of them, charged with supervision of fiscal and commercial matters, 2 Farrand (Journal) 336-7, id. (Madison) 342-3; as reported out by the committee of detail, the specification of all official duties was omitted and the word "Commerce" dropped out of the name of the department, without, however, altering the number of departments or general structure of the system, 2 id. (Journal) 367, id. (Madison) 375.

⁶³2 Farrand 135.

⁶⁴The Wilson holograph, 2 Farrand 157, 158-9, is particularly striking. It reads: "That the United States in Congress be authorized—to pass Acts for raising a revenue—by levying duties on all goods and merchandise of foreign growth or manufacture imported into any port of the United States—by stamps on paper vellum or parchment—and by a postage on all letters and packages passing through the general post office, to be applied to such federal purposes as they shall deem proper and expedient—to make rules and regulations for the collection thereof—to pass Acts for the regulation of trade and commerce as well with foreign nations as with each other *to lay and collect taxes* (italicized in the original)," "The legislature of U. S. shall have the exclusive power of raising a military land force—of regulating the trade of the several states as well with foreign nations as with each other—of levying duties upon imports and exports." The two versions apparently represent different stages in the refinement of the draft. See also the Randolph-Rutledge holograph, 2 id. 142-3, where the commerce clause is wedged in between the grant of the federal taxing power and the prohibition of state duties on imports, in a rather haphazard-appearing listing.

⁶⁵Number 12.

The identification of commercial regulation with customs stands out plainly in Wilson's exclamation, when the provision forbidding export duties by the federal government was being debated, "To deny this power is to take from the common govt. half the regulation of trade,"⁶⁶ the other half being, as the context shows, the corresponding control over imports. Between them, the implication plainly is, they constituted the whole of commercial regulation. This was an exaggerated view of the matter, for, as will hereafter appear, other things besides duties on imports and exports were discussed as falling within the commerce clause. Nevertheless, customs control obviously was regarded as the principal ingredient of commercial regulation. An outstanding defect under the articles, it was commonly felt, was the lack of power in the United States either to raise a revenue to meet expenses and discharge the continental debt or to cope with discriminatory commercial regulations of foreign countries, in particular of Great Britain.⁶⁷ The efforts of some states to satisfy congressional requisitions out of their imposts were defeated by diversion of foreign shipments to others which, by chance or by design, undercut the tariffs of the former; and, until a uniform control of the subject was placed in federal hands, other nations could circumvent with impunity the commercial regulations of the several states.⁶⁸ Moreover, the states were using their imposts as weapons against each other, either offensively, as where

⁶⁶2 Farrand (Madison) 363.

⁶⁷Wilson said, addressing the Pennsylvania convention, "The commencement of peace was likewise the commencement of our distress and disgrace. Devoid of power, we could neither prevent the excessive importations which lately deluged the country, nor even raise from that excess a contribution to the public revenue; devoid of importance, we were unable to command a sale for our commodities in a foreign market," 3 Farrand 141. Of like tenor are the remarks in the federal convention of Randolph, 1 id. (McHenry) 25; of Charles Pinckney in the Observations on the Plan of Government, 3 id. 116; of Dawes in the Massachusetts convention, 2 Elliott 58-59; of Monroe in the Virginia convention, 3 id. 213; of Charles Pinckney in the South Carolina legislature, 4 id. 253; and of Wilson in the Pennsylvania convention, McMaster 297-8; as well as the expressions set forth in memoranda of Madison, 3 Farrand 548, in McMaster (Centinel) 605, Essays (Williamson) 402; id. (Ellsworth) 140-1; Federalist, No. 22 (Hamilton) 102-3. But see the remarks of Lansing in the New York convention, indicating an opinion that the individual states were willing, without changing the articles otherwise to cede the requisite power to Congress, 2 Elliott 218.

⁶⁸Dawes in the Massachusetts convention, 2 Elliott 57 ("... as Congress could not make laws, whereby they could obtain a revenue, in their own ways from *impost* or *excise*, they multiplied their requisition on the several states. When a state was thus called on, it would perhaps impose new duties on its own trade to procure money for paying its quota of federal demands. This would drive the trade to such neighboring states as made no such new impositions; thus the revenue would be lost with the trade, and

the importing states imposed tariffs the ultimate incidence of which was calculated to fall on others not blessed by geography with as good and accessible harbors,⁶⁹ or defensively, as by strengthening their tariff walls against each other to compensate for revenue deficiencies resulting from diversion of foreign shipments to the states with the least onerous imposts.⁷⁰

The course of the discussion belies the heresy, later fathered by an illustrious sire, that the restrictions on state power as to levying imposts were referable to the taxing power and not to the power of regulating commerce.⁷¹ So far as the convention was concerned, these clauses formed part of the commercial system being incorporated into the constitution,⁷² and the ensuing declamation and pamphleteering dealt with them on that basis.⁷³

the only resort would be to a direct tax.") Other comments on this same problem may be found in Davie's remarks in the North Carolina convention, 4 id. 18, in *Federalist*, No. 22 (Hamilton), in Madison's letter of 1832 to Professor Davis, 3 Farrand 519, and in certain memorandum notes of Madison, id. 547-8.

⁶⁹Pamphlets (Webster) 62-63; Essays (Williamson) 404; Madison memoranda, 3 Farrand 542. New York, Pennsylvania, Rhode Island, and Virginia were named as having been the offenders in a letter by Madison in 1832, 3 Farrand 519. The limited power left with the states to levy import or export duties was viewed with alarm by some of the framers as likely to perpetuate this danger, see remarks of Madison, 2 Farrand (Madison) 441, and of Gouverneur Morris, id. 442. Cf. *Federalist*, No. 7 (Hamilton) 28-29.

⁷⁰Essays (Williamson) 403 ("Does one of the states attempt to raise a little money by imports or other commercial regulations? A neighbouring state immediately alters her laws, and defeats the revenue by throwing the trade into a different channel. Instead of supporting or assisting, we are uniformly taking the advantage of one another.") And see the remarks in the Virginia convention of Randolph, 3 Elliott 82, and of Madison, id. 260; in the South Carolina legislature of Charles Pinckney, 4 id. 253-4; and in a memorandum by Madison, 3 Farrand 547-8.

⁷¹The doctrine was propounded by Chief Justice Marshall, in his opinion in *Gibbons v. Ogden*, (1824) 9 Wheat. (U.S.) 1, 201-2, 6 L. Ed. 23.

⁷²See the remarks in the federal convention of Madison, 2 Farrand (Madison) 441, 442, 588-9, and his comments with reference to export duties in his letter of October 24, 1787, to Jefferson, 3 id. 135. The evidence against Marshall's companion contention, that the tonnage tax provisions dealt with tax rather than commercial matters, is even more direct and forcible. "Mr. Madison. Whether the states are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague. . . . Mr. Langdon insisted that the regulation of tonnage was an essential part of the regulation of trade and that the states ought to have nothing to do with it." 2 id. 625.

⁷³*Federalist*, No. 44 (Madison) 229 ("The restraint on the power of the states over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils. It is needless, therefore, to remark further on this head, than that the manner in which the restraint is qualified seems well calculated to secure to the states a reasonable discretion in providing for the convenience of their imports and exports, and to the United States a reasonable check against the abuse of this discretion.") For other illustrations, see McHenry's address to the Maryland House of Delegates, 3 Farrand 149, and the comments in Pamphlets (Iredell) 366, 367.

Indeed, in its primordial form the prohibition of state imposts appeared merely as a qualifying clause in a section of the commerce clause, wedged in between matters of indubitably "commerce," rather than "tax," character.⁷⁴

The office of the commerce clause, by and large, was to afford an effective control over imports and exports;⁷⁵ and the characteristic method of exercising such control, namely, the levy of imposts, was the type-situation with reference to which the content of the commerce clause was ordinarily evaluated.⁷⁶

The delegates were sophisticated enough to recognize the dual role of imposts and duties, as sources of revenue and as instruments of commercial policy, indicating the differentiation clearly when it seemed material to do so.⁷⁷ They were conscious of, and not hostile to, the potentiality of manipulating duties for the protection and encouragement of particular enterprises. Indeed, this very feature constituted a strong recommendation of the system, in the minds of some, both in and out of the convention.⁷⁸ When the intimate relations between commerce and fiscal

⁷⁴See the Randolph-Rutledge holograph draft, prepared apparently for use in the committee of detail, 1 Farrand 142, 143.

⁷⁵See the remarks in the federal convention of Sherman, 2 Farrand (Madison) 308; in the Virginia convention of Madison, 3 Elliott 260; in the North Carolina convention of Davie, 4 id. 18; and the comments in Pamphlets (Smith) 107, Essays (Ellsworth) 140, 193 and in Federalist, No. 12 (Hamilton) 56, 57, id. No. 42 (Madison) 214-5; and see the remarks in the federal convention of Luther Martin, enumerating the characteristic export products of the several states and characterizing them as "articles of commerce," with the implication that they were peculiarly entitled to that description, 4 Farrand 25.

⁷⁶See the discussion of August 21 on the prohibition of state export duties, 2 Farrand (Madison) 360-4, particularly the statements of Langdon, Ellsworth, Sherman, Madison, Wilson and Clymer; the remarks of Charles Pinckney in the Observations on the Plan of Government, 3 id. 116; of Daves in the Massachusetts convention, 2 Elliott 58-59; of Monroe in the Virginia convention, 3 id. 214-5; of Wilson in the Pennsylvania convention, McMaster 388; of Madison in a letter of 1832 to Professor Davis, 3 Farrand 520-1; in the letter of "Plain Truth," McMaster 188-9; in Essays (Ellsworth) 176, id. (Clinton) 271-2, id. (Williamson) 404. The extreme form, of exclusion of foreign produce, was the subject of remarks by Gorham in the Massachusetts convention, 2 Elliott 106-7.

⁷⁷E.g., Clymer's observation on prohibition to the states of export duties, 2 Farrand (Madison) 363 ("—He moved as a qualification of the power of taxing Exports that it should be restrained to regulations of trade by inserting after the word 'duty' sec. 4 art. VII the words 'for the purpose of revenue.'"), and King's statement, 2 id. (Madison) 442.

⁷⁸Daves in the Massachusetts convention, 2 Elliott 57, 59; Davie in the North Carolina convention, 4 id. 20; Essays (Winthrop) 80. This is confirmed by Madison's letter of 1828 to J. C. Cabell, 3 Farrand 477, and of 1832 to Professor Davis, id. 520-1. Cf. Mason's argument for allowing the states at least a measure of authority to impose import duties so that they might encourage particular manufactures, 2 id. (Madison) 441, and King's remarks of like tenor, id. (Madison) 442.

management are stressed, therefore, it must not be understood as implying any suggestion that the commerce clause was inserted as pre-eminently a money-raising scheme, although that consideration was present. Rather, what is important to observe is the disclosed uniformity in thinking of levies on imports and exports as the appropriate instrumental device by which the grant of power would be effectuated.

It seems to have been precisely this feature of the commerce clause which generated for it the almost universal assent already described.⁷⁹ Some of the opponents of the new system alluded specifically to its workings in this connection in explanation of their acquiescence in the propriety of granting Congress the power over commerce.⁸⁰ As will appear subsequently, in reviewing other fields of activity thought of at the time as embraced in commercial regulation, this was the only one of the lot as to which no qualifications or restrictions of the federal power over commerce were proposed. It, apparently, *was* the "regulation of commerce" which united so many suffrages, with a primacy and an appeal sufficiently strong to commend the grant even to those who, in other particulars, wished its exercise to be restrained or confined.

(b) THE MARITIME AND NAVIGATION ASPECT. While the fiscal aspect of commercial regulation lingered pervasively in the background, a quite different phase occupied the bitter forefront of discussion. The two were neatly paired in Pinckney's observation that, in granting to the federal government the power to

⁷⁹Luther Martin, in his address to the Maryland House of Delegates, intimated indeed an objection to the fiscal aspect of federal commerce regulation, (see 3 Farrand 156), as also in his Genuine Information (id. 200); but, inasmuch as he had unequivocally agreed to it as necessary and desirable, in an address in the Philadelphia convention (4 id. 23), it is impossible to consider the objection as an expression of sincere dissent, or to regard it as other than the making of a point by an extremely skillful politician and advocate (which he was). It was charged by various contemporaries that the opposition and non-signature of some members of the New York delegation were grounded in the desire of that state, or of a party in it, to preserve unimpaired its advantageous situation for levying imposts, see Essays (Ellsworth) 176; letter of Madison to Thomas Cooper, 3 Farrand 474; Pinckney's Observations on the Plan of Government, id. 116 *semble*. This may have been so; but at any rate, they did not care to avow it, if that were the case, no such reason being assigned in any of the writings or discussions of the New York antis.

⁸⁰See the remarks in the Virginia convention of Monroe, 3 Elliott 213, 215, and of Tyler, id. 640; in the addresses to the people, by the minority in the Pennsylvania legislature which voted to call the ratifying convention in that state, McMaster 78-79, and by the minority of convention delegates opposed to ratification, id. 455-6; in (Wilson's notes of) Findlay's remarks in the Pennsylvania convention, id. 770; and of the campaign literature, see id. (Centinel) 604; Pamphlets (Smith) 107; Essays (Winthrop) 80-81.

regulate trade, "the intention . . . [was] . . . to invest the United States with the power of rendering our maritime regulations uniform and efficient, and to enable them to raise a revenue."⁸¹ When, decades later, Chief Justice Marshall observed that "All America understands and has uniformly understood the word commerce to comprehend navigation,"⁸² he spoke accurately. What he omitted to note was that that very understanding had caused sturdy opposition to the constitution in some quarters, and in others had rendered it acceptable only in consequence of a specific compromise, with the navigation sector of commercial regulation the concession yielded to obtain compensatory special advantages.

The first dim outline of trouble shaping—and indeed virtually the first mention of navigation in the records of the convention⁸³—appears in the Randolph-Rutledge draft for the committee of detail, in the form of a qualification of the power to regulate commerce, that "a navigation act shall not be passed but with the consent of . . . $\frac{2}{3}$ of the members present . . ."⁸⁴ Randolph seems initially to have generalized the requirement so as to prescribe an extraordinary majority for any regulation of commerce; but, on further consideration, either he or Rutledge deleted the provisions except as they related to enactment of a navigation act.⁸⁵ In both its broader and its narrower forms, the qualification assumes prophetic significance when one notes its appearance in the draft prepared by Randolph of Virginia and Rutledge of South Carolina, as contrasted with its absence from that of Wilson of Pennsylvania.

The proposition did not come before the convention, however, until near the end of August. Pinckney then "gave notice that he would move that the consent of $\frac{3}{4}$ of the whole legislature be necessary to the enacting a law respecting the regulation of trade or the formation of a navigation act,"⁸⁶ a resolution apparently conforming with his original inclinations expressed in his plan for a constitution,⁸⁷ and which he carried into effect four days later by moving "that no act of the legislature for the

⁸¹3 Farrand 116.

⁸²Gibbons v. Ogden, (1824) 9 Wheat. (U.S.) 1, 190, 6 L. Ed. 23.

⁸³Randolph, in listing the "blessings" the existing government was "incapable to produce" had named, *inter alia*, "the improvement of inland navigation," 1 Farrand (McHenry) 27.

⁸⁴1 Farrand 143.

⁸⁵1 Farrand 143.

⁸⁶2 Farrand (McHenry) 420.

⁸⁷See the statements in his *Observations on the Plan of Government*, 3 Farrand 118.

purpose of regulating the commerce of the United States with foreign powers or among the several states shall be passed without the assent of $\frac{2}{3}$ of the members of each House."⁸⁸ As will be observed, the proportion of votes required to enact a commercial regulation was reduced from that indicated in the notice to that which he had previously had in mind. More significantly, the terms of the original Pinckney plan were resurrected by elimination of specific mention of a navigation act from the resolution, indicating that, in its author's opinion, it was comprehended under the general designation of commercial regulation and needed no categorical reference. That fear of regulations of navigation was the real gist of the demand for the extraordinary majority does not rest on this inference, however. It is spelled out clearly enough in the warm debate which occurred as to Pinckney's motion.⁸⁹

Ultimately the motion was defeated,⁹⁰ it was charged by horse trading between the delegates of the sea-faring New England states and those from the slave-holding Southern states, the latter surrendering the demand for extraordinary majorities in connection with commercial regulations, i.e., navigation laws, in return for immunity of slave importation from congressional interference prior to 1808.⁹¹ Randolph took the occasion to remark that, if the motion were defeated, he might feel compelled to withhold his assent from the constitution.⁹² He was as good as his word, explicitly grounding his non-signature on the "submission

⁸⁸2 Farrand (Journal) 446; id. (Madison) 449.

⁸⁹See the entire debate of August 29, 2 Farrand (Madison) 449-452. The common understanding of the disputants on both sides is revealed by the interchange between two North Carolina delegates. "Mr. Williamson was in favor of making two-thirds instead of a majority requisite, as more satisfactory to the Southern people. . . . He acknowledged that he did not think the motion requiring $\frac{2}{3}$ necessary in itself, because if a majority of Northern states should push their regulations too far the S[outhern] states would build ships for themselves; but he knew the Southern people were apprehensive on this subject and would be pleased with the precaution. Mr. Spaight was against the motion. The Southern states could at any time save themselves from oppression, by building ships for their own use," id. 449-450. Martin, who was on the committee to which the resolution was referred, describes it as "the restrictive clause relative to navigation acts," 3 id. 211.

⁹⁰2 Farrand (Journal) 446; id. (Madison) 453.

⁹¹2 Farrand (Madison) 449 n.: Martin, *Genuine Information*, 3 id. 210-1; letter of Madison to Robert Walsh of November 27, 1819, 3 id. 436. It should be noted, however, that the only Southern state which eventually voted against the motion was South Carolina, and that, even if it had joined with the others in its own section, the combined votes of the Northern and Middle states, which were united solidly against the measure, would have sufficed to defeat it.

⁹²2 Farrand (Madison) 452-3.

of commerce to a mere majority in the legislature."⁹³ A like sentiment, considerably amplified in statement, was voiced by Mason as a reason why he did not sign.⁹⁴ Others of the Southern delegates remained opposed to this feature of the new constitution, although not violently enough so to induce conduct similar to that of Randolph and Mason.⁹⁵

This objection, that the power to regulate commerce, by a mere majority, would facilitate adoption of a navigation act beneficial to the shipping states and prejudicial to the South, was a favorite subject of complaint with the Southern opponents of the constitution, alike in the occasional literature and in the debates over ratification.⁹⁶ No one denied that the commerce power did indeed extend to permit regulations of navigation. The foes of the new constitution in the North said as little as possible about these potentialities of the clause,⁹⁷ which its adherents in that section extolled as one of the solid advantages of the new arrangement,⁹⁸ and for which those in the South apologized as mere compensation for substantial concessions made to that part of the country.⁹⁹ North Carolina alone demanded the incorporation of the extraordinary majority as to any "navigation law or law

⁹³Letter to the speaker of the Virginia house, 3 Farrand 127, Pamphlets (Randolph) 275.

⁹⁴2 Farrand 639-640. Pamphlets (Mason) 331. Circulation of this part of Mason's attack on the constitution was confined, it seems, to the Southern states; it was excised from copies sent into the New England states, see Essays (Ellsworth) 162.

⁹⁵Pinckney, Remarks in convention, 2 Farrand (Madison) 633; Butler, letter to Weedon Butler, 3 id. 304.

⁹⁶Letter of Richard Henry Lee to Randolph, 1 Elliott 504; Lowndes in the South Carolina legislature, 4 id. 288; Pamphlets (Lee) 319.

⁹⁷The dissenting minority in the Pennsylvania legislature which called the ratifying convention acknowledged the propriety of giving Congress an "entire jurisdiction over maritime affairs," McMaster 79; and see id. (Centinel) 594. An obscure passage in Essays (Winthrop) 53-54 seems to indicate opposition to navigation laws; and see id. (Winthrop) 81.

⁹⁸Dawes in the Massachusetts convention, 2 Elliott 58; Phillips in the Massachusetts convention, id. 67; Russell in the Massachusetts convention, id. 139; Bradford in the Rhode Island convention, Foster, Minutes of the Rhode Island Convention 43, *semble*; Essays (Ellsworth) 140-1.

⁹⁹Letter of the North Carolina delegates to the governor, 3 Farrand 84 ("... While we were taking so much care to guard ourselves against being over reached, and to form rules of taxation that might operate in our favor it is not to be supposed that our Northern brethren were inattentive to their particular interest. A navigation Act or the power to regulate commerce in the hands of the national government by which American ships and seamen may be fully employed is the desirable weight that is thrown into the Northern scale. This is what the Southern states have given in exchanges for the advantages we mentioned above. . . ."); Charles Cotesworth-Pinckney in the South Carolina legislature, 4 Elliott 284; Pamphlets (Ramsay) 376-7 (an unusually emphatic justification); Essays (Williamson) 401.

regulating commerce," as an amendment to the constitution.¹⁰⁰ The Maryland convention by a formal vote refused to make such a recommendation.¹⁰¹

The conflict, sectional throughout, leaves no room for doubt that the power to enact a navigation law was included in that of regulating commerce. Indeed, as has also been seen to be the case in connection with import-export control, there was a tendency at times to treat the two as substantially synonymous.¹⁰² Witness the variant forms in which the proposition was presented; likewise such statements, startling in their literal language, as that "the power of regulating commerce was a pure concession on the part of the S. (outhern) states,"¹⁰³ that "it was the true interest of the S. states to have no regulation of commerce,"¹⁰⁴ and that self help by the latter against excessive use of the power granted was available in the potential power to build their own ships and develop their own maritime interests.¹⁰⁵ Hamilton, with greater refinement of thought, distinguished an active from a passive commerce, placing in the former category matters relating to navigation and the carrying trade, and urging as a strong argument for adoption of the constitution the anticipated effect of the commerce clause in securing to American enterprise this branch of commerce, instead of confining it to the mere passive commerce of supplying products to and a market for foreign nations.¹⁰⁶

Two provisions, incorporated at the instance of the Maryland delegation, further testify to the understanding that regulations of

¹⁰⁰1 Elliott 245.

¹⁰¹2 Elliott 552-3.

¹⁰²E.g., Madison's remarks in the Virginia convention, 3 Elliott 332 ("If the commercial interests be in danger, why are we alarmed about the carrying trade? Why is it said that the carrying states will predominate if commerce be in danger?")

¹⁰³Charles Pinckney's remarks, 2 Farrand (Madison) 449; and see statement of Butler, id. (Madison) 451.

¹⁰⁴Remarks of Charles Cotesworth Pinckney, 2 Farrand (Madison) 449.

¹⁰⁵See the statements of Williamson, 2 Farrand (Madison) 450-1; Spaight, id. 451; Rutledge, id. 452; letter of North Carolina delegates to Governor Caswell, 3 id. 84; remarks of Madison, 2 id. (Madison) 451 *semble*. The opposition expressed skepticism, however, as to the practicability of this mode of redress, see letter of Richard Henry Lee to Randolph, 1 Elliott 504-5. Encouragement of shipbuilding was mentioned by the friends of the constitution as one of the benefits to be anticipated under the commerce power, (see remarks of McKean in the Pennsylvania convention, 2 Elliott 542, McMaster 379; letter of "A Pennsylvania Farmer," id. 128; Pamphlets (Jay) 73 *semble*; id. (Iredell) 357-8; Essays (Ellsworth) 194) and this phase was expressly excepted from condemnation by some of those in opposition (see Essays (Winthrop) 61).

¹⁰⁶Federalist, No. 11.

navigation were within the purview of the power to regulate commerce. One, the well-known clause prohibiting Congress from establishing preferences or discriminations between the ports of the different states and specifying precisely what might not be done in that connection, deals purely with questions of navigation, excluding from the grant of the commercial power certain matters which it was apprehended might otherwise fall within it.¹⁰⁷ The other, stemming from a fear lest the control of commerce and of imposts deprive the states of the charges on vessels customarily levied to defray the cost of maintenance of navigation facilities,¹⁰⁸ is concerned, in its most interesting aspect, with the location of control over such facilities and in that aspect will be noted hereafter. It did, however, find expression in the provision authorizing the states, with the permission of Congress, to levy tonnage duties, although there was a mild dispute as to whether they did not possess that power any way. In any event, the provision was incorporated, whether by way of clarification or donation of authority. The important thing for present purposes is the reference of this particular levy, so peculiarly and closely connected with shipping, to the category of commercial regulation on the part of some at least of the delegates.¹⁰⁹ The inclusion of the subject-matter "navigation" within the "commerce" whose regulation was confided to Congress was thus conspicuously brought to the attention of all concerned at various stages in the formulation and adoption of the constitution, was never objected to as an erroneous interpretation of the power, and in the upshot won wide acquiescence.

Moreover, this broad category itself was broken down into sub-categories. As with the power over imposts and customs, so with that over navigation, the proponents of the constitution were fond of drawing attention to the discriminations against American

¹⁰⁷This was evidently the content of the "restrictory clauses drawn up for the VII article respecting commerce" which Martin exhibited to his Maryland colleagues on August 22, see 2 Farrand (McHenry) 378. It was introduced by Carroll and Martin on August 25 and opposed by no one, although Gorham "thought such a precaution unnecessary," *id.* (Madison) 417-8. Its terms seem to have been generally acceptable, objection being voiced on a single occasion, for the rather fanciful reason that "the only use of such a regulation is, to keep each state in complete ignorance of its own resources," *Essays* (Winthrop) 70.

¹⁰⁸See 2 Farrand (McHenry) 212, in which McHenry tells of mentioning his foreboding to the Maryland delegation; his renewed consideration of the problems at a later date, *id.* 504, 530; and various alternative drafts of resolutions relating to the subject, *id.* 634.

¹⁰⁹See 2 Farrand (Madison) 626.

shipping imposed by foreign countries, notably Great Britain, the impotence of the states individually to concert any effective opposition, and the need for a central legislature capable of bringing the united pressure of all the states to bear against such hostile regulations.¹¹⁰ The idea was that of opposing regulation of shipping with regulation of shipping, "exclusion . . . to exclusion, and restriction to restriction,"¹¹¹ of enabling Congress to retaliate by the adoption and implementation of policies parallel to those which were being enforced by other nations.

Preferences were to be given American shipping and American seamen,¹¹² possibly by excluding foreign vessels from our carrying trade either absolutely, or except to permit them to bring in the produce of the nation under whose flag they sailed,¹¹³ except, of course, in so far as commercial treaties provided for reciprocal

¹¹⁰This attitude was cogently stated by Charles Pinckney in the South Carolina legislature, 4 Elliott 253, 254 ("It must be recollected that upon the conclusion of the definitive treaty, great inconveniences were experienced as resulting from the inefficacy of the Confederation. The one first and most sensibly felt was the destruction of our commerce occasioned by the restrictions of other nations, whose policy it was not in the power of the general government to counteract. . . . Frequent and unsuccessful attempts were made by Congress to obtain the necessary powers. The states, too, individually attempted, by navigation acts and other commercial provisions, to remedy the evil. These, instead of correcting, served but to increase it; their regulations interfered not only with each other but, in almost every instance, with treaties existing under the authority of the Union. Hence arose the necessity of some general and permanent system, which should at once embrace all interests, and, by placing the states upon firm and united ground, enable them effectually to assert their commercial rights.") For expressions of similar sentiments, see the remarks in the federal convention of Clymer, 2 Farrand (Madison) 450, and Madison, id. (Madison) 452; in the Massachusetts convention of Dawes, 2 Elliott 58; in the North Carolina convention of Davie, 4 id. 18-19, 20; and, in the miscellaneous literature, Pinckney in the *Observations on the Plan of Government*, 3 Farrand 116; Madison's memoranda, 3 id. 547-8; McMaster (*Centinel*) 605, 616; Pamphlets (Jay) 72-73; id. (Randolph) 265; id. (Iredell) 358; Essays (Ellsworth) 140-1; *Federalist*, No. 11 (Hamilton) 49-50. Incidental benefits anticipated from the commerce clause were the restoration to the United States of the trade with the West Indies (see remarks of Rutledge, 2 Farrand (Madison) 452; memoranda of Madison, 3 id. 547-8; McMaster (*Centinel*) 605; *Federalist*, No. 11 (Hamilton) 49-50) and the development of a navy (see remarks of Gouverneur Morris, 2 Farrand (Madison) 450, and of Madison, id. (Madison) 452; Pamphlets (Ramsay) 377 *semble*; *Federalist*, No. 11 (Hamilton) 50, 52), both of them considerations intimately connected with navigation and so evidencing the fact that its control was understood as comprehended within the grant of power to regulate commerce.

¹¹¹Pamphlets (Randolph) 265.

¹¹²See remarks of Gouverneur Morris, 2 Farrand (Madison) 450; Pamphlets (Iredell) 357; id. (Ramsay) 376-7; Essays (Williamson) 401.

¹¹³This thought was brought out particularly in the Massachusetts convention; see statements of Dawes, 2 Elliott 58, of Phillips, id. 67, and of Russell, id. 139. And see *Federalist*, No. 11 (Hamilton) 49.

equality of shipping.¹¹⁴ In appropriate contingencies Congress was to have power to exclude the vessels of particular foreign nations from our ports.¹¹⁵

The control exercisable by the United States was not to be limited to intercourse with foreign nations, however, but, in accordance with the familiar provisions in other nations' regulations, was to extend to the coastal shipping between American ports.¹¹⁶ It was even suggested, somewhat hesitantly, that the navigation of interstate interior waterways might perhaps be within the scope of regulation provided for by the commerce clause.¹¹⁷ In the main, however, commerce was a matter of sea-borne traffic, as is shown by the general tenor of the foregoing statements and emphasized by such declarations as that New York had "but one port and outlet to your commerce,"¹¹⁸ and that establishment of a navy was essential "if we mean to be a commercial people,"¹¹⁹ and by the classification as commerce of the fisheries off the Canadian banks.¹²⁰ Again, the most systematic treatment of the commerce clause in the whole course of discussion, that of Hamilton in the eleventh number of the *Federalist*, devotes only about a tenth of its space to the domestic commerce of the country, and even then discusses it largely as instrumental to the furthering of maritime commerce with other nations.¹²¹

As the amendments incorporated at the instance of the Maryland delegation show, tonnage duties and regulations governing entry clearance, and the levy of imposts in the various ports of the country were comprehended within the concept of regulations of navigation, which in turn was a component in the broader notion of "commerce," entertained by the delegates.

In essence, the thinking on this branch of the subject is revealed to have been in terms characteristic of the ordinary contemporary "navigation laws," with which the states had had ex-

¹¹⁴See statement of Gorham, 2 Farrand (Madison) 453.

¹¹⁵Charles Cotesworth Pinckney in the South Carolina legislature, 4 Elliott 305.

¹¹⁶See remarks of Madison in the Federal convention, 2 Farrand (Madison) 452, of Dawes in the Massachusetts convention, 2 Elliott 58, and of Wilson in the Pennsylvania convention, McMaster 357.

¹¹⁷McHenry's notes, 2 Farrand 504.

¹¹⁸Pamphlets (Jay) 84; this is also the tenor of Madison's remarks in *Federalist*, No. 41, 209. For a similar comment as to New Hampshire, see Essays (Ellsworth) 193.

¹¹⁹*Federalist*, No. 24 (Hamilton) 119; *id.* No. 34 (Madison) 161.

¹²⁰Letter of Pierce Butler to Weedon Butler, 3 Farrand 304; Essays (Ellsworth) 194.

¹²¹See *Federalist*, pp. 48-53 inclusive.

perience as British colonies, and which were then in common employment among maritime nations.

(c) THE MERCANTILE ASPECT. There are occasional fleeting glimpses of still a third class of subjects as being embraced within the grant of the power "to regulate commerce." Its content is, perhaps, most clearly apparent in the vigorous efforts made to withdraw a portion of it from the ambit of congressional action, culminating in proposals by five ratifying conventions to amend the constitution to provide "that Congress erect no company of merchants with exclusive advantages of commerce."¹²²

The attempt of the Parliament of Great Britain to regulate commerce in 1773 by giving the British East India Company a virtual monopoly of the American tea trade, with its dramatic climax in the Boston Tea Party, was a crucial misstep in pre-Revolutionary commercial regulation,¹²³ with which presumably the delegates to the Philadelphia convention were all familiar. Nobody appears to have been thinking of the commerce clause in terms of that experience, however, and the matter might well never have arisen, had not Madison injudiciously opened it up in mid-August by moving that Congress be authorized to grant charters of incorporation.¹²⁴ Even then the whole issue might have been avoided, since the committee to which proposed amendments were referred failed to report the motion favorably.¹²⁵ But Madison returned to the attack in the closing days of the convention, with an amendment to a pending proposal for authorizing Congress to establish canals, broadening and extending it into his favorite provision for congressional charters of incorporation. Apparently he was thinking innocently enough of enabling Congress to take steps to improve transportation facilities; but the fat was in the fire. King protested that the provision would be referred in some localities to the abhorred idea of a bank, in others to mercantile monopolies. Wilson retorted that the power to establish mercantile monopolies was already included in the power to regu-

¹²²See the instruments of ratification of Massachusetts, 1 Elliott 322, 323, of New Hampshire, id. 325, 326, of New York, id. 329, 330, and of Rhode Island, id. 335, 337; and the amendments proposed in conjunction with rejection by the first North Carolina convention, 4 id. 245, 246. The New York and Rhode Island proposals differed slightly in language from that quoted in the text, both omitting the words "of merchants" and the former adding the further injunction that Congress should not "grant monopolies."

¹²³See McLaughlin, *Constitutional History of the United States* (1935) 77.

¹²⁴2 Farrand (Journal) 321; id. (Madison) 325.

¹²⁵2 Farrand (Journal) 366-7; id. (Madison) 375.

late trade. Mason demurred, expressing antipathy to monopolies coupled with a conviction that the commerce clause did not authorize them. The resolution was re-confined to the original subject of canals, and in that form defeated.¹²⁶

The consequences of Madison's undue zeal and Wilson's inept explanation were not to be avoided. The hypothesized power to erect commercial monopolies gave Gerry a reason (or a pretext) for withholding his signature and assent.¹²⁷ Mason stuck by his original declaration that the commerce clause gave no such power, but did find authority for that purpose latent in the "necessary and proper clause and listed that among his reasons for not supporting the constitution."¹²⁸ Similar apprehension was expressed, in other quarters, in connection with the provision giving Congress exclusive jurisdiction in the federal district to be erected.¹²⁹ Elsewhere, Gerry's fear of the monopolistic potentialities of the commerce clause was adopted and elaborated.¹³⁰

Whether the amendment was lost because of a lack of conviction that the constitution gave power to erect mercantile monopolies or because of a willingness that Congress should have such power, no one can say. The whole controversy did focus attention on the notion that the commerce clause gave Congress jurisdiction over the affairs of the merchant, as well as those of the mariner and of the customs official. But again there is danger in treating eighteenth century politicians as if they were talking twentieth century language. We must strive instead to discover the contemporary meaning of merchant, who composed that class and what were its understood activities and attributes, rather than assume its employment with the connotations which it currently possesses.

The records afford even less in the way of guidance here than has been found as to the meaning of commerce, probably because

¹²⁶ Farrand (Madison) 615-6.

¹²⁷ Farrand (Madison) 633; *id.* (King) 635-6.

¹²⁸ Farrand (Mason) 640; Pamphlets (Mason) 331. See also the reflections of McHenry, 2 Farrand (McHenry) 529-530. Iredell argued that the privileges and immunities clause, and that forbidding preference to or discrimination against ports, were conclusive against this interpretation, Pamphlets (Iredell) 357.

¹²⁹ Grayson in the Virginia convention, 3 Elliott 291, 431; Essays (Winthrop) 61. See amendment 13 proposed by the first North Carolina convention in rejecting the constitution, 1 Elliott 245.

¹³⁰ Essays (Winthrop) 61, 71, 79-80, 97, 98. A like view is hinted at in McMaster (Centinel) 625, although it is not entirely clear that the fear of a monopoly was being placed squarely on the power of commercial regulation.

the assumption of a common understanding was equally great and the problem itself was more peripheral. The term was only occasionally employed; but, after examination of the instances where it was used, it assumes a tolerably definite meaning. Sometimes, of course, the context is quite colorless and gives no assistance in discovering the import.¹³¹ The frequency of reference concurrently to the activities of merchants and navigators (or seamen)¹³² is, however, suggestive. There is naturally no intention to imply that the two occupations were deemed to be synonymous; but their repeated immediate proximity does afford some indication that their activities were thought of in connection with each other, raising an inference that typically they may have been fellow-participants in some common function or service.

What did the foes of the new constitution have to say specifically about the merchant and his activities? "The truth is this country buys more than it sells; It imports more than it exports. There are too many merchants in proportion to the farmers and manufacturers," was one New Yorker's explanation why no radical governmental revision was urgently needed.¹³³ A quite different argument to support the same point issued from Massachusetts; the balance of trade, it was said, was largely in that state's favor; "the credit of our merchants is therefore fully established in foreign countries."¹³⁴ If the new scheme were adopted, one warned, the merchants would be its victims; the result of the proposal to raise revenues to support the government by import duties would be that prices would rise, "the consumers must be fewer; the merchants must import less; trade will languish," and the whole notion was thus doomed to failure.¹³⁵ Conversely a Southern opponent pictured them as the villains of the new dispensation; the regulation of commerce by a mere majority "will enable the merchants of the Northern and Eastern states not only to demand an exorbitant freight, but to monopolize the purchase of the . . . [Southern staple] . . . commodities."¹³⁶ While these arguments, each tailored to the sentiments of the locality to which the author

¹³¹E.g., Pamphlets (Smith) 94 ("The merchant drives his commerce, and none can deprive him of the gain he honestly acquires.")

¹³²See the language of Madison in the convention, 2 Farrand (Madison) 451; also Essays (Williamson) 405; Federalist, No. 11 (Hamilton) 51, id. No. 4 (Jay) 14.

¹³³Pamphlets (Smith) 107.

¹³⁴Essays (Winthrop) 72.

¹³⁵Essays (Clinton) 271.

¹³⁶2 Farrand (Mason) 640; Pamphlets (Mason) 331.

was addressing himself, were diverse enough in all conscience, they do exhibit one uniformity. Throughout the merchant is alluded to as one primarily concerned in importation, one who can manipulate carrying charges and monopolize the dealings in staples, a person possessed of credit abroad. This consistency of thought is wholly harmonious with the conjoint references to merchants and seamen already observed.

The proponents of the constitution spoke in the same strain. Under the feeble existing government, conditions were intolerable; "no sooner is the merchant prepared for foreign ports, with the treasures which this new world offers" than he is told that they are closed against him.¹³⁷ In Massachusetts, the warning was sounded that "private merchants will, no doubt, for the sake of long credit, or some other such temporary advantage, prefer the ships of foreigners" until such time as the federal government should be empowered to preserve American shipping for New England vessels.¹³⁸ As for any fear of oppression of the Southern states by a navigation act, that was groundless, because of the potential emigration to the South of Northern merchants and seamen.¹³⁹ A bid for rural support sought to identify the interests of the farmer and the merchant, pointing out the dependence of the former on the latter for a good price

"and where do you find this? Is it not where trade flourishes, and when the merchant can freely export the produce of the country . . . ? When the merchant does not purchase, your produce is low. . . . You cannot expect many purchases when trade is restricted and your merchants are shut out from nine-tenths of the ports in the world."¹⁴⁰

Unless the constitution should be adopted, Hamilton urged, the spirit of enterprise characteristic of American merchants would be stifled, and we should be confined to a mere passive commerce;¹⁴¹ this he defined as a "come-and-get-it" type of trade, as distinguished from active commerce, marked by our participation in the carrying trade.

The emphasis on the relation of the merchant to the carrying trade, to imports, and to foreign commerce, did not mean that that was the exclusive activity of merchants. Rather it called attention to what, although their characteristic, was not their sole function.

¹³⁷Pamphlets (Randolph) 265.

¹³⁸Dawes in the Massachusetts convention, 2 Elliott 58.

¹³⁹Madison in the federal convention, 2 Farrand (Madison) 451.

¹⁴⁰Essays (Ellsworth) 140, 141.

Scattered references to mercantile enterprise of a domestic nature, or at any rate not limited by the context to foreign trade, demonstrate this and indicate the prevailing understanding as to the merchant's place in the national economy.

There seems to be, in the whole course of discussion, only one instance of a statement confined in its language to domestic trade, in it the merchant is presented as a person who characteristically possesses correspondents in other states.¹⁴² In another connection, where interior commerce was clearly though perhaps not exclusively referred to, the proposition was advanced that "the whole commerce of the United States may be exclusively carried on by merchants residing within the seat of government and those places of arms which may be purchased of the state governments."¹⁴³ The statement clearly envisaged large-scale operations as the merchant's task and correspondingly excluded the processes of local distribution. Today we tend to lump as merchants nearly all the intermediate agents in the course of marketing between the producer (or processor) and the consumer, with the retailer as perhaps the archetype. That no such scope attached to the term when the constitution was formulated is suggested by the reference to "merchants" and "tradesmen" as independent categories,¹⁴⁴ and again by the explicit distinction recognized between local "buying and selling" and "commerce."¹⁴⁵ To a spokesman of the agricultural South, the merchant was one who found a market elsewhere for the produce of that section and who produced the inflow to it of finished goods.¹⁴⁶ To Hamilton, a representative of the quickening industrial life of New York City, "the mechanic and manufacturing arts furnish[ed] the materials of mercantile enterprise and industry," and the merchant's role was that of "natural patron and friend" of mechanics and manufacturers.¹⁴⁷

The merchants, it was said, were well qualified to testify to the defects in the existing system, under which their "adventures"

¹⁴¹Federalist, No. 11, 51.

¹⁴²Wilson in the Pennsylvania convention, McMaster 357 ("At present how are we circumstanced? Merchants of eminence will tell you that they can trust their correspondents without law; but they cannot trust the laws of the state in which their correspondents live.")

¹⁴³Grayson in the Virginia convention, 3 Elliott 281.

¹⁴⁴See the subscription to the petition of the Rhode Island minority addressed to the federal convention, 3 Farrand 19.

¹⁴⁵Pamphlets (Jay) 72.

¹⁴⁶Davie in the North Carolina convention, 4 Elliott 20 ("The merchant furnishes the planter with such articles as he cannot manufacture, and finds him a market for his produce.")

¹⁴⁷Federalist, No. 35, 167, 168.

fail.¹⁴⁸ "What prudent merchant," the readers of the *Federalist* were asked, "will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed?"¹⁴⁹ On the other hand, if the proposed union should be formed and the staples of every section made available throughout the whole nation without obstruction, a beneficial stabilization in "the operations of the merchant" would ensue—an argument the force of which "the speculative trader will at once perceive."¹⁵⁰ Mercantile adventures, fortunes hazarded in new branches of commerce, reference interchangeably to "merchants" and speculative traders. This is hardly language appropriate to describe the small fry engaged in relatively local or petty sales activities.

This exhausts the catalogue of instances wherein mention of merchants or their activities was made. There is controversy over the grant of monopolies or exclusive privileges to companies of merchants. There is bracketing of the dealings of merchants and seamen. There is allusion to the position of merchants in the business of import and export, and to their relations with foreign countries and foreign commerce. There is recognition of the difference between their status and that of tradesmen, and between commerce and "buying and selling;" of their connection with correspondents in other states; of the possibility of their becoming segregated in a few centers instead of being dispersed throughout the country. They are the means by which the surplus manufactures and the staple agricultural products of the country are marketed, and a supply of goods not locally produced is introduced into the various sections of the country. They are "speculative traders" whose "adventures" are subject to be defeated by the possibility that their "plans may be rendered unlawful before they can be executed." The aggregate effect of these different allusions is to prick out a dim but thoroughly consistent pattern of the eighteenth century "merchant" as his contemporaries thought of him. This merchant is the same fellow as he for whom the law merchant and mercantilist theory of economics were named. His activities conform nicely to those of the present day importer, commission house, and wholesale firm, with just a dash of the commodity exchange; they hardly embrace those of the jobber, the hawker, or the retailer, who to us is the merchant par excellence.

¹⁴⁸Wilson in the Pennsylvania convention, McMaster 413.

¹⁴⁹Federalist, No. 62 (Hamilton or Madison) 319.

¹⁵⁰Federalist, No. 11 (Hamilton) 53.

(d) "WITH FOREIGN NATIONS, AND AMONG THE SEVERAL STATES." These three large classes of subjects—fiscal regulation as to imports and exports, navigation, "mercantile" enterprises—are the only ones that there is any evidence for believing were thought of by any one as embraced within "commerce" or affected by the grant of power to regulate it. They constitute the whole body of information available for marking the boundaries of the grant affirmatively, by showing what was understood to be within it. Other materials aid in fixing those boundaries negatively, by a disclosure of what was thought not to be included. Before turning to them, however, it may be worth while to comment on a characteristic common to the three discovered aspects.

Customs and shipping are, even today, and large scale mercantile dealings were, at the time of the formation of the constitution, subjects characteristically and peculiarly associated with external dealings, trade with other nations. The insistent recurrence in all the discussions to matters having this common nucleus suggests the inference that, in giving Congress power to regulate commerce, the major concern was with extranational traffic, with only incidental and minor regard to interstate commerce. Such an inference is amply corroborated.

The technique of using verbal association as an index of psychological connection is again fruitful. Examples abound in which commerce is spoken of in immediate connection with matters of purely international significance, such as war, treaties, and the like,¹⁵¹ or in which a discussion, purporting to deal with commerce generally, focuses exclusively on some purely international attribute, consequence, or incident, such as the negotiation or enforcement of commercial treaties.¹⁵² Madison's impression of the matter

¹⁵¹See the language in the federal convention of Wilson, 1 Farrand (Yates) 413, id. (King) 416, and of Madison, id. (Yates) 535; in the Massachusetts convention of Sam Adams, 2 Elliott 124; in the Virginia convention of Monroe, 3 id. 213; in the North Carolina convention of Davie, 4 id. 18, and of Maclaine, 4 id. 29; letter of French chargé d'affaires to French foreign minister, 3 Farrand 41, of Yates and Lansing to the Governor of New York, 3 id. 246, and of Randolph to the speaker of the Virginia house, 1 Elliott 485; Pamphlets (Dickinson) 215; id. (Lee) 287, 301; Essays (Ellsworth) 153; id. (Winthrop) 79-80; Federalist, No. 41 (Madison) 204; id. No. 53 (Hamilton or Madison) 276. Occasionally the apposition of commerce and foreign trade is made explicitly, e.g., Hamilton's remarks to the New York convention in which he speaks of "the regulation of commerce—that is, the whole system of foreign intercourse," 2 Elliott 350. Note the decided emphasis on foreign trade in Hamilton's systematic elaboration of the commerce clause in Federalist, No. 11, 48-53 inclusive.

¹⁵²Gorham in the Massachusetts convention, 2 Elliott 106-7 ("How often, observed the honorable gentleman, has Mr. Adams tried to accomplish a commercial treaty with England with but feeble power! They prohibit our

is perhaps indicated by quotation of his notes recording the convention's approval of the commerce clause, "Clause for regulating commerce with foreign nations &c agreed to nem. con."¹⁵³ This being nearly a week before there had been any suggestion of incorporating the Indian trade in the clause, the relegation of interstate commerce to an "&c" was rather cavalier treatment if the power were deemed anywhere nearly as important as that over the fully specified "foreign commerce."

Reference has already been made to the fact that one of the evils the commerce clause was avowedly designed to remedy was the inability of the states to cope separately with the hostile mercantile regulations of foreign powers.¹⁵⁴

The notion is distinctly traceable throughout the discussions that federal regulation of commerce would bear very differently on the different states, and even that they could be classified into commercial and uncommercial states, the former being those with good and accessible ports and an abundance of ships and seamen, the latter either the prospective inland states or the existing seaboard states with poor harbor facilities and an undeveloped marine.¹⁵⁵ The distinction, predicated on circumstances of prime

oil, fish, lumber, pot and pearl ashes, from being imported into their territories, in order to favor Nova Scotia, for they know we cannot make general retaliating laws. They have a design in Nova Scotia to rival us in the fishery, and our situation at present favors their design. From the abundance of our markets, we could supply them with beef, butter, pork, &c., but they lay what restrictions on them they please, which they durst not do, were there an adequate power lodged in the general government to regulate commerce"; *Federalist*, No. 12 (Hamilton) 57 ("If, on the contrary, there be but one government pervading all the states, there will be as to the principal part of our commerce but ONE side to guard—the ATLANTIC COAST"); and see address of dissenting minority of Pennsylvania convention, *McMaster 456*; *Pamphlets* (Smith) 107; *id.* (Lee) 301; *id.* (Ramsay) 379; *Essays* (Ellsworth) 140-1; *id.* (Williamson) 402; *Federalist*, No. 4 (Jay) 13-14.

¹⁵³2 Farrand (Madison) 308.

¹⁵⁴*Supra* pp. 448, 455.

¹⁵⁵See the remarks in the federal convention of Gerry, 2 Farrand (Madison) 3, of Sherman, *id.* 308, of Langdon, *id.* 360, of Wilson, *id.* 360, 362, of Gouverneur Morris, *id.* 442, of C. C. Pinckney, *id.* 449-450; of Clymer, *id.* 450; of Williamson, *id.* 450-1; of Butler, *id.* 451 ("He considered the interest of these (the Southern) and the Eastern states, to be as different as the interests of Russia and Turkey"); of Mason, *id.* (Madison) 451, (Mason) 640; of Madison, *id.* (Madison) 451-2, and of Gorham, *id.* (Madison) 453; in the New York convention of Hamilton, 2 Elliott 235-6; in the Virginia convention of Madison, 3 *id.* 535; in the North Carolina convention of Davie, 4 *id.* 120, 238; in the South Carolina legislature of C. C. Pinckney, 4 *id.* 284; in the Pennsylvania convention of Findlay, *McMaster 770*, and of McKean, *id.* 784 (both as summarized in Wilson's notes); and in the occasional literature, see Martin, *Genuine Information*; 3 Farrand 200; letter of Pierce Butler to Weedon Butler, 3 *id.* 304; letter of 1832, Madison to Professor Davis, 3 *id.* 519; letter of Richard Henry Lee to Randolph, 1 Elliott 504, *Pamphlets* (Mason) 331; *id.* (Dickinson) 166-7; *id.* (Lee) 319,

importance to foreign commerce, in disregard of other variations between states with regard to inland waterways, convenient land routes, and other factors of vastly greater significance for interstate commerce, was valid only in so far as commerce was identified with foreign commerce.

In like manner, the division of duties between the proposed secretary of commerce and finance and the proposed secretary of domestic affairs, with the former charged with superintendence of "the commercial interests of the United States" and the latter vested with oversight of a broad range of internal concerns of the union, was inconsistent with the notion that commerce impinged to any considerable extent on purely domestic matters.

True, power to regulate the commerce "with the Indian tribes" was included in the same clause with that over foreign and interstate commerce; and the Indian trade was almost exclusively an internal trade. Its presence, however, is of little value as a guide to what was meant by regulation of commerce in the rest of the clause. The Indian trade was a special subject with a definite content, which had been within the jurisdiction of congress under the articles of confederation, although with certain ambiguous qualifications omitted from the constitutional provision.¹⁵⁷ It thus derived from a totally different branch of the Randolph outline than did the control over foreign and interstate commerce. Nor was this the only respect in which they lacked a common origin. They did not emerge simultaneously as co-ordinated parts of a whole. The provision for regulation of commerce with foreign nations and among the several states had been published by the committee of detail two weeks,¹⁵⁸ and definitely approved by the convention two days,¹⁵⁹ before the subject of the Indian trade was introduced on the floor of the convention.¹⁶⁰ It was not until several days later that the latter was reported out of committee, still encumbered with some of the qualifications attached to it in the articles;¹⁶¹ and

id. (Iredell) 357; id. (Ramsay) 377; Essays (Winthrop) 73, 74, 76-77; id. (Ellsworth) 194; id. (Clinton) 271-2; id. (Martin) 374; id. (Williamson) 401. See remarks of Wilson in the Pennsylvania convention, McMaster 388 (similar contrast between Philadelphia and the transmontane counties of Pennsylvania); Essays (Winthrop) 70 (characterizing Massachusetts as "the most commercial state upon the continent.")

¹⁵⁷Article IX.

¹⁵⁸On August 2, sec 2 Farrand (Madison) 182.

¹⁵⁹On August 16, see 2 Farrand (Journal) 304, id. (Madison) 308.

¹⁶⁰By Madison, on August 18, see 2 Farrand (Journal) 321, id. (Madison) 325.

¹⁶¹On August 22, see 2 Farrand (Journal) 366-7, id. (Madison) 375.

less than two weeks before the close of the convention that it was finally incorporated with the rest of the commerce clause and approved in the form with which we are familiar.¹⁶² By this time, the larger part of the discussion in the federal convention relative to commercial regulations was over, and in that which did take place later there is no language relating even remotely to the Indian trade. In the ensuing extramural discussion, it attracted little attention, being mentioned only three times:—once in connection with an assertion of usurpation of powers by the congress under the articles and a warning that excessive fees might be demanded for licenses to trade with the Indians,¹⁶³ once to praise it for having dropped the ambiguous qualifications annexed to it in the articles,¹⁶⁴ again by an opponent of the constitution in listing the powers proper to be confided to Congress.¹⁶⁵ Whatever regulation of commerce might mean in connection with transactions with the Indians, it was so distinct and specialized a subject as to afford no basis for argument as to the meaning of the rest of the clause.

The obvious objection to an interpretation according paramount importance to the control of external trade is that it seems virtually to read the phrase "and among the several states" out of the commerce clause. This no mere inferences can be allowed to do, however strongly they may seem to be demanded; for the stubborn fact is that the language quoted was inserted in the constitution. It cannot be disregarded or dismissed. Some meaning must be assigned to it. It is, however, legitimate, indeed imperative, in the light of what has preceded, to inquire what meaning was attached by contemporary opinion to the grant of power as to interstate commerce.

That contemporary opinion is perhaps most distinctly articulated in two non-contemporary statements, issuing some thirty-three and forty-two years, respectively, after the framing of the constitution from men who had conspicuously participated as delegates in the convention. The first, in a speech by Charles Pinckney in the House of Representatives, points to the provisions of the sixth clause of article I, sec. 9, which prescribes uniformity and impartiality of commercial regulations between the states, as affording the best clue to the meaning of the grant of power over inter-

¹⁶²On September 4, see 2 Farrand (Journal) 495, id. (Madison) 499, id. (McHenry) 503.

¹⁶³Essays (Yates) 302-3.

¹⁶⁴Federalist, No. 42, (Madison) 215-6.

¹⁶⁵Pamphlets (Lee) 301.

state commerce.¹⁶⁶ The other, in a letter written by Madison, explicitly negatives the suggestion that the clause was designed to have as wide an operation as the companion grant with regard to foreign commerce, and assigns to it instead merely "a negative and preventive" function, to control state-created discriminations and preferences.¹⁶⁷ If their statements are to be taken as truly expounding the understanding of the framers and their contemporaries, there can be little doubt that the major preoccupation was with foreign trade and that the power over interstate commerce, while coordinate in expression, was distinctly secondary in scope and intended operation.

One eminent modern student of the constitution has given Pinckney and Madison the lie direct, challenging the accuracy of their recollection as to the purpose of the provisions and asserting a complete parity of operation for both main branches of the commerce clause.¹⁶⁸ That possibility is certainly not wholly precluded despite the statements referred to, for, without imputing to Pinckney or Madison any bias affecting their statements, much can be forgotten in three or four decades of a busy life. The issue can be resolved only by searching the strictly contemporary records to see whether they confirm the later recollection of the participants.

¹⁶⁶Annals 16th Congress, 1st sess., II, p. 1318, quoted in 3 Farrand 444 ("I will only mention here, as it is perfectly within my recollection, that the power was given to Congress to regulate the commerce by water between the states, and it being feared, by the Southern, that the Eastern would, whenever they could, do so to the disadvantage of the Southern states, you will find, in the 6th [sic] section of the 1st article, Congress are prevented from taxing exports, or giving preference to the ports of one state over another, or obliging vessels bound from one state to clear, enter, or pay duties in another; *which restrictions, more clearly than anything else, prove what the power to regulate commerce among the several states means.*") [Italics supplied].

¹⁶⁷Letter of February 13, 1829, to J. C. Cabell, 3 Farrand 478 ("For a like reason, I made no reference to the 'power to regulate commerce among the several states.' I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it, which, however just, might give birth to specious though unsound objections. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the general government, in which, alone, however, the remedial power could be lodged.")

¹⁶⁸Corwin, *The Commerce Power Versus States Rights* (1936) Preface, p. ix ("In 1789 Congress was deemed to have the same power over commerce among the states as over that with foreign nations, the same right to restrain the one as the other for what it thought to be the good of the country.")

If they are generally opposed or are conflicting, we may doubt the explanation even of eyewitnesses. If, however, they are of the same general tenor and no substantially inconsistent statements appear, it would seem that the subsequent pronouncements must be accepted as accurate expositions of the understanding as of the time the constitution was framed.

The first thing that strikes one's attention in seeking references directed to interstate commerce is their paucity. When contrasted with the proliferation of statements already cited where commerce was discussed in a context specifically pointing to foreign commerce, this in itself might be thought to furnish negative evidence in support of Pinckney and Madison. It would be unusual if, when two connected subjects, each of great importance, were simultaneously up for discussion, and if they were regarded as having co-ordinate consequences, a wealth of consideration should be devoted to one to the practically complete neglect of the other. However, it might be possible.

In the convention, control over commerce between the states seems to have been mentioned only nine times. In three of these instances, reference was made to the potentialities of the clause as affording a means of protection against injury inflicted by hostile or harmful restrictions or regulations of sister states, without intimating what particular type of state commercial regulation was thus to be stricken down.¹⁶⁹ One of these statements seems to suggest a distinction as to the effect of federal commercial action where citizens alone were concerned and where foreigners were involved, the former being treated as of a negative or restraining character while the latter apparently implied positive controlling action.¹⁷⁰ The other six all refer in like manner to the anticipated operation of the grant in preventing discriminatory commercial regulations by states, but mention particular subjects of legislation as being affected. Twice the restraining effect of

¹⁶⁹2 Farrand (Madison) 308 ("Mr. Sherman . . . the oppression of the uncommercial states was guarded against by the power to regulate trade between the states. As to compelling foreigners, that might be done by regulating trade in general." This probably refers to export duties, since it occurs in a speech dealing with that subject, but of course the language itself is more general, hence I have not felt justified in pigeonholing it there); *id.* 360 ("Mr. Ellsworth . . . the power of regulating trade between the states will protect them against each other. . . .") See editorial note to the preceding quotation); *id.* 451-2 ("Mr. Madison . . . observed that the disadvantage to the S[outhern] states from a navigation act, lay chiefly in a temporary rise of freight, attended however with . . . a removal of the existing and injurious retaliations among the states on each other.")

¹⁷⁰See statement of Sherman, *supra*, note 169.

the grant is mentioned in connection with state export duties.¹⁷¹ Once it seems to have been involved in an interchange with regard to a state impost on imports.¹⁷² And it was mentioned once as to each of the subjects of tolls on the interior waterways,¹⁷³ inspection fees,¹⁷⁴ and compulsory entry and clearance.¹⁷⁵ There is thus not a single occasion in the proceedings of the convention itself where the grant of power over commerce between the states was advanced as the basis for independent affirmative regulation by the federal government. Instead, it was uniformly mentioned as a device for preventing obstructive or partial regulations by the states. It is perhaps also worthy of note that, in every instance (with the possible exception of compulsory entry and clearance),

¹⁷¹² Farrand (Madison) 360 ("Mr. Govr. Morris . . . there is great weight in the argument, that the exporting states will tax the produce of their uncommercial neighbours. The power of regulating the trade between Pa. & N. Jersey will never prevent the former from taxing the latter. Nor will such a tax force a direct exportation from N. Jersey—the advantages possessed by a large trading city outweigh the disadvantages of a moderate duty; and will retain the trade in that channel—"); *id.* 361 ("Mr. M[adison] . . . the regulation of trade between state and state cannot effect more than indirectly to hinder a state from taxing its own exports: by authorizing its citizens to carry their commodities freely into a neighbouring state which might decline taxing exports in order to draw into its channel the trade of its neighbours—").

¹⁷²² Farrand (Madison) 441 ("Col. Mason observed that particular states might wish to encourage by impost duties certain manufactures for which they enjoyed natural advantages, as Virginia the manufacture of hemp &c. Mr. Madison—The encouragement of manufacture in that mode requires duties not only on imports directly from foreign countries, but from the other states in the Union, which would revive all the mischiefs experienced from the want of a genl. government over commerce.")

¹⁷³² Farrand (McHenry) 504 ("Is it proper to declare all the navigable waters or rivers and within the United States common high ways? Perhaps a power to restrain any state from demanding tribute of another state in such cases is comprehended in the power to regulate trade between state and state. This to be further considered.")

¹⁷⁴² Farrand (Madison) 588-9 (Mason had moved the insertion of the clause permitting state inspection fees to pay expenses of inspection. "Mr. Madison 2d'd the motion—It would at least be harmless; and might have the good effect of restraining the states to bona fide duties for the purpose, as well as of authorizing explicitly such duties; tho' perhaps the best guard against an abuse of the power of the states on this subject, was the right in the genl. government to regulate trade between state and state.")

¹⁷⁵² Farrand (Madison) 418 ("Mr. Carroll & Mr. L. Martin expressed their apprehensions, and the probable apprehensions of their constituents, that under the power of regulating trade the general legislature might favor the ports of particular states by requiring vessels destined to or from other states to enter & clear thereat, as vessels belonging to Baltimore to enter & clear at Norfolk &c. . . . Mr. Ghorum thought such a precaution unnecessary." This perhaps comes the closest to an assertion of a power of positive regulation of any statement in the convention; it is worth noting, however, that a clause expressly prohibiting such action was passed without opposition, and that Martin at this stage was unusually inclined to imagine dangers from federal oppression far in excess of the prevailing temper of the convention.)

where the character of the objectionable state legislation was spelled out, it consisted of measures of a purely fiscal character. It is clear that the grant of power to Congress was conceived of as preventing states from levying tribute on movements in commerce to and from other states. There is no hint that it meant anything more. So far as the language of the delegates is concerned, it accorded uniformly with the subsequent statements of Pinckney and Madison.

In the hurlyburly of ratification, little attention was paid to the provision regarding commerce between the several states. One pamphleteer, in Massachusetts, did indeed suggest its elimination from the instrument, leaving only the foreign and Indian trade in the commerce clause.¹⁷⁶ The conception he entertained of the clause and his reasons for wishing its removal are somewhat obscure. Professedly he opposed it on the ground that the power would enable Congress to grant mercantile monopolies; but his evident satisfaction with the superior commercial position of his home state induces a suspicion that he may have preferred that it be allowed to remain in a position to adopt such commercial regulations as it pleased without let or hindrance.¹⁷⁷ Aside from this one instance, there was apparently no opposition to the grant of this particular power, although one Virginia opponent of the constitution damned it with very faint—and wholly indefinite—praise.¹⁷⁸

Nor was very much made of the clause by its friends, for the most part. To be sure, there were occasional references to the chaotic condition of existing commercial relations between the states, which may perhaps have had some psychological link with the clause.¹⁷⁹ Also, there were direct and nasty charges that the opposition to the constitution in New York was largely attributable to the reluctance of placemen in that state to see the revenues arising from commercial exactions, ultimately paid by citizens of neighboring states, slip from their fingers.¹⁸⁰ Such comments

¹⁷⁶Essays (Winthrop) 118 ("Congress shall not have the power of regulating the intercourse between the states. . . .") The writer proposed fourteen amendments, this being a part of the second.

¹⁷⁷See Essays (Winthrop) 53-109 *passim*.

¹⁷⁸Grayson in the Virginia convention, 3 Elliott 280 ("I am willing to give the government the regulation of trade. It will be serviceable for regulating the trade among the states. But I believe that it will not be attended with the advantages generally expected.")

¹⁷⁹See, e.g., the statement of Daves in the Massachusetts convention, 2 Elliott 57-58.

¹⁸⁰For the most forthright of these attacks, see Essays (Ellsworth) 176.

assumed that adoption of the constitution would terminate the conflicting and prejudicial fiscal burdens imposed by the several states on each other's commerce, and to this extent are in line with the sentiments of the framers, as indicated in the records of the convention and as remembered by Pinckney and Madison. They are not accompanied, however, by specific reference to the power over commerce between the states and hence are only of conjectural value in determining the meaning of that grant. Randolph's expressions are, perhaps, very little more specific, in his letter to the speaker of the Virginia House of Delegates, in which he speaks of the general government's acting as mediator of disputes between the states, particularly in disputes over commercial matters.¹⁸¹ Again, Sherman, enumerating the main functions of the federal government, lists the duties "to preserve . . . a beneficial intercourse among themselves [the states], and to regulate and protect our commerce with foreign nations."¹⁸² The language is interesting; the beneficial intercourse between the states was merely to be preserved, while foreign commerce was to be not only protected but also regulated. The innuendo would seem to be that, in dealings between the states, the federal power was to be in essence supervisory, much the same sort of a function as the Randolph statement indicates.

The only thing approaching a full discussion of the power over interstate commerce is found in the *Federalist*, where it was touched on three times, twice by Hamilton and once by Madison. Both authors alluded to the experience of foreign confederacies, and specifically of Germany and the Netherlands, as illustrating the need for such a provision. The references were in both cases concretely and expressly directed to the prohibitions of internal tolls and customs contained in the fundamental laws of those nations.¹⁸³ Hamilton drove the moral home by a reference to the "interfering and unneighbourly regulations of some States" currently existing under the articles, and the threat which they held for the future peaceful relations of the several states if they were not eliminated.¹⁸⁴ In addition to the need for removing

¹⁸¹Pamphlets (Randolph) 267, I Elliott 485-6 ("It follows, too, that the general government ought to be the supreme arbiter for adjusting every contention among the states. In all their connections, therefore, with each other, and particularly in commerce, which will probably create the greatest discord, it ought to hold the reins.")

¹⁸²Essays (Sherman).

¹⁸³*Federalist*, No. 22 (Hamilton) 103; id. No. 42 (Madison) 215.

¹⁸⁴*Federalist*, No. 22, 103 ("The interfering and unneighbourly regulations of some states, contrary to the true spirit of the Union, have, in differ-

these sources of friction, he developed one further argument for granting the federal government the power to regulate commerce between the states. Greater stability for commercial enterprise, and specifically for the export trade, would result, he asserted, if the produce and resources of each part of the union were freely accessible to every other part.¹⁸⁵ In this view, foreign commerce was the primary object of concern, and the regulation of interstate commerce, that is to say, the unrestricted movement of commerce within the borders of the United States was desirable as promoting its expansion. Madison professed to supplement the reasoning already given; but his argument consisted only of a more explicit characterization of the power over interstate commerce as one needed to render the control of foreign commerce complete and effectual, and an elaborate reiteration of the necessity of relieving the non-commercial states from oppression by regulations of the commercial states.¹⁸⁶ Thus, the only reasoned

ent instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the confederacy.")

¹⁸⁵Federalist, No. 11, 51-52 ("An unrestrained intercourse between the states themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope from the diversity in the productions of different states. When the staple of one fails from a bad harvest or unproductive crop, it can call to its aid the staple of another. The variety not less than the value of products for exportation contributes to the activity of foreign commerce. It can be conducted upon much better terms with a large number of materials of a given value than with a small number of materials of the same value; arising from the competitions of trade and from the fluctuations of markets.")

¹⁸⁶Federalist, No. 42, 214-5 ("The defect of power in the existing confederacy to regulate the commerce between its several members is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added that, without this supplemental provision, the great and essential power of regulating foreign commerce, would have been incomplete and ineffectual. A very material object of this power was the relief of the states which import and export through other states from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between state and state, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience that such a practise would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities and not improbably terminate in serious interruptions of the public tranquillity.")

analysis of the power over commerce between the states comes down to two main propositions. First, state regulations, particularly those of a fiscal nature, were already galling; their removal was essential, as demonstrated by foreign examples and American sentiment, and should be effected by confiding regulation of commerce to the federal government. Second, power over interstate commerce was desirable as a collateral power to the control of foreign commerce, inasmuch as the removal of barriers to interstate trade erected by state restrictions and exactions would extend the available commercial resources and so tend to stabilize mercantile activity. It was recommended as a desirable corrective of state discrimination and as a useful incidental power in the promotion of foreign trade.

All the extant contemporary evidence thus tends to confirm Pinckney's and Madison's recollection that the power as to commerce between the states was in the main a "negative and preventive" provision. It was a shield against state exactions and no two-edged sword for positive federal attack. To be sure, this must be modified to include as part of its intended effect a certain ancillary relation in the development of foreign commerce, which, however, was largely traceable to the removal of state trade barriers. Furthermore, regulation of the coasting trade and a measure of control over large-scale mercantile enterprise, including to some extent interstate trade, was within the purview of the grant. Still, in substance Pinckney's and Madison's memories seem to have served them faithfully. Despite the formal parallelism of the grants, there is no tenable reason for believing that anywhere nearly so large a range of action was given over commerce "among the several states" as over that "with foreign nations."

A striking proof of the relatively limited scope of the power over interstate, as compared with foreign, commerce is afforded by one pervading and significant silence. The immunization of the slave trade from congressional action until 1808, subject to the right to levy a stated head tax,¹⁸⁷ is in itself so far collateral that it need not detain us here.¹⁸⁸ It is enough to note that the

¹⁸⁷Constitution of the United States, art. I, sec. 9, cl. 1 ("The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.")

¹⁸⁸The story is briefly told in McLaughlin, *Constitutional History of the United States* (1935) 188-190.

clause was accepted by the delegates as being frankly an exception to the congressional power over foreign commerce,¹⁸⁹ and that it was so labelled in subsequent discussion both in and out of the state ratifying conventions.¹⁹⁰ The apprehensions of the Southern delegates on this score, so far as foreign commerce was concerned, were so lively as assertedly even to induce extremely unwelcome concessions on their part.¹⁹¹ Yet the possibility of federal restraints on the movement of slaves in interstate commerce was not once mentioned. It was, indeed, a suggestion that Congress had authority to regulate interstate dealings in slaves which provoked Pinckney's belated explanation of the limited operation of the interstate commerce power. No similar suggestion had been forthcoming at a period coeval with the formation of the constitution. Such deep silence cannot safely be dismissed as accidental. Some Southerners were ready enough to take alarm at the constitution, and the commerce clause was sectionally unpopular anyway, so that the argument would hardly have been neglected had it come to mind. The pertinacity of Southern leaders in safeguarding the foreign slave trade and their utter absence of precautions with respect to interstate slave traffic are not easily explainable on any hypothesis other than that of universal concurrence at the time in the view that the power over interstate commerce was of a merely preventive—and perhaps somewhat ancillary—character.

(e) "NOT-COMMERCE" IN 1787. That the grant of the commerce power did not authorize the federal government to assume control of all matters conditioning the flow of commercial intercourse between the states seems fairly certain. As to some matters, separate special clauses were inserted to permit the exercise of authority by Congress or to deny it to the states. Others were recognized as being unaffected by the commerce clause or any other grants of power to Congress.

Illustrative of the insertion of specific clauses to permit congressional superintendence is the grant of the power to "fix the Standard of Weights and Measures,"¹⁹² a power which Hamilton described as in England belonging to the king in his capacity as

¹⁸⁹See, e.g., the statements of Ellsworth, 2 Farrand (Madison) 364, and of Luther Martin in the *Genuine Information*, 3 id. 211.

¹⁹⁰Wilson in the Pennsylvania convention, McMaster 312-3; *Federalist*, No. 42 (Madison) 213-4. The debate of June 15, 1788, in the Virginia convention (see 3 Elliott 454-464) is particularly full on the point, and not even there was there the slightest hint at the possibility of congressional restriction under the power over interstate commerce.

¹⁹¹*Supra* n. 91.

¹⁹²Constitution of the United States, art. I, sec. 8, cl. 5.

"arbiter of commerce."¹⁹³ Even more clearly devised for the convenience of trade were the provisions designed to stabilize the circulating media of exchange and prevent the avoidance of contractual obligations. The powers given Congress to "coin money, regulate the value thereof, and of foreign coin,"¹⁹⁴ and to punish counterfeiting,¹⁹⁵ and the prohibition of state coinage, emission of bills of credit, legal tender laws, and legislation in impairment of the obligation of contracts¹⁹⁶ were regarded as provisions for the furtherance of a ready commercial intercourse between the states and with foreign merchants.¹⁹⁷ So, too, the diversity jurisdiction of the federal courts was justified as affording a needed measure of protection for those engaged in carrying on commercial intercourse between the states.¹⁹⁸ The implementation of the commerce clause in this fashion was a work of supererogation, it would seem, if the commerce clause itself conferred power to exclude, whether by action or inaction, all hostile and interfering state action. Occasional reference was made to other subjects similarly involved in commercial intercourse as not having been affected by the provisions of the constitution. Gouverneur Morris pointed to the want of power to punish forgeries of commercial paper circulating between the states.¹⁹⁹ Madison, in seconding the clause

¹⁹³Federalist, No. 69, 356.

¹⁹⁴Constitution of the United States, art. I, sec. 8, cl. 5.

¹⁹⁵Constitution of the United States, art. I, sec. 8, cl. 6.

¹⁹⁶Constitution of the United States, art. I, sec. 10, cl. 2.

¹⁹⁷Letter of Sherman and Ellsworth to the Governor of Connecticut, 3 Farrand 100 ("The restraint on the legislatures of the several states respecting emitting bills of credit, making anything but money a tender in payment of debts, or impairing the obligation of contracts by ex post facto laws, was thought necessary as a security to commerce, in which the interests of foreigners, as well as of the citizens of different states, may be affected."); McHenry, address to the Maryland legislature, 3 id. 145 (emission of bills of credit); Pamphlets (Ramsay) 374; Federalist, No. 44 (Madison) 227, 228 (coinage, emission of bills of credit); Yeates in the Pennsylvania convention (Wilson's notes), McMaster 769 (semble); see Federalist, No. 69 (Hamilton) 356 (coinage and regulation of foreign coin subject to king as "arbiter of commerce" in England.)

¹⁹⁸Madison in the Virginia convention, 3 Elliott 534, 535 ("Let me observe that, so far as the judicial power may extend to controversies between citizens of different states, and so far as it gives them power to correct, by another trial, a verdict obtained by local prejudices, it is favorable to those states which carry on commerce. There are a number of commercial states which carry on trade for other states. Should the states in debt to them make unjust regulations, the justice that would be obtained by the creditors might be merely imaginary and nominal. It might be either entirely denied, or partially granted"); Marshall in the Virginia convention, id. 556 (this is noteworthy as the only time during the progress of the convention when the future Chief Justice made mention of commercial regulation); Wilson in the Pennsylvania convention, McMaster 357.

¹⁹⁹2 Farrand (Madison) 315.

conditionally permitting state export duties incidental to inspections, subsumed the continuing power of the states as to inspection laws as qualified, if at all, only to the extent that they involved charges to defray expenses.²⁰⁰

Today we are accustomed to think of the arteries of commerce, the highways and the inland streams, harbors, bridges, and the like, as within the ambit of congressional power under the commerce clause. This is not the way the framers of the constitution looked at the matter.

There was indeed sentiment, at one time, for placing such channels of intercourse under federal control; but not on the theory that such control was a part of commercial regulation. Thus, Randolph in presenting his plan to the convention listed as one of the blessings which the existing government was incapable of producing, and which inferentially should be contemplated as an object of the government to be created, "the establishment of great national works—the improvement of navigation."²⁰¹ But this was while the constitution was in an extremely rudimentary stage, before there was any commerce clause. Again, after that clause had been blocked out and approved, a proposed addition to the constitution would have given the federal executive cognizance of "the opening of roads and navigations and the facilitating communications throughout the United States;" but it was to the secretary of domestic affairs, not to his colleague, the secretary of commerce and finance, that superintendence of these matters was to be entrusted.²⁰²

Aside from these early suggestions, neither of which was incorporated in the constitution, the discussions uniformly assumed that control over such transportation facilities was to remain with the states, and not to be devolved upon the general government. No more was claimed for the commerce clause than that it might prevent states through which interstate streams ran from levying toll for their use.²⁰³ Regulation and preservation of harbours, their deepening and improvement, and the installation and marking of buoys were understood to remain with the states; indeed, it was to provide a revenue for these purposes that the states were con-

²⁰⁰2 Farrand (Madison) 588-9.

²⁰¹1 Farrand (McHenry) 25-26.

²⁰²2 Farrand 335-6. The other specific objects to be entrusted to the secretary of domestic affairs, namely, "matters of general police" and "the state of agriculture and manufactures" rather definitely indicate that the matter of transportation facilities within the country was regarded as a head of internal governmental power.

²⁰³See 2 Farrand (McHenry) 504.

ditionally authorized to exact tonnage duties.²⁰⁴ The appointment of port wardens was spoken of as a continuing power of the several states.²⁰⁵ Opponents of the constitution, speaking scoffingly of the restricted range of powers still to be left with the states, listed in that category the control over roads,²⁰⁶ bridges,²⁰⁷ and ferries.²⁰⁸ Its advocates recognized that those subjects would be for the states to handle,²⁰⁹ contending, however, that they were but a small section of the very extensive field where state legislative jurisdiction would continue unabated.

It may be thought, from the generality of the terms employed, that these statements related only to intrastate roads, bridges, and ferries, of no substantial importance as avenues of interstate communication. Any such supposition is distinctly negated by the debate attending Franklin's unsuccessful attempt to bestow on Congress the power of constructing canals.²¹⁰ Proponents of that amendment made clear that it was aimed at providing authority for establishing facilities of interstate intercourse and at preventing state obstruction of the general welfare in this connection. It was rejected by a vote of eight states to three. The defeat of the motion was thenceforth understood as meaning that the federal government was to have no jurisdiction over the canal system, whatever the degree to which the national inter-communication might be involved.²¹¹ The decision is of peculiar interest

²⁰⁴See 2 Farrand (McHenry) 504, 634.

²⁰⁵Pamphlets (Coxe) 152.

²⁰⁶See the remarks of Henry in the Virginia convention, 3 Elliott 171; and of Lowndes in the South Carolina legislature, 4 id. 287.

²⁰⁷Henry in the Virginia convention, *supra*, note 206.

²⁰⁸Lowndes in the South Carolina legislature, *supra*, note 206.

²⁰⁹Livingston in the New York convention, 2 Elliott 384; Pendleton in the Virginia convention, 3 id. 301.

²¹⁰2 Farrand (Madison) 615-6.

²¹¹Letter of Madison to Chapman in 1831, 3 Farrand 494-5 ("Perhaps I ought not to omit the remark, that although I concur in the defect of powers in Congress on the subject of internal improvements, my abstract opinion has been, that, in the case of canals particularly, the power would have been properly vested in Congress. It was more than once proposed in the Convention, of 1787, and rejected from an apprehension, chiefly, that it might prove an obstacle to the adoption of the constitution. Such an addition to the federal powers was thought to be strongly recommended by several considerations: 1. As Congress would possess, exclusively, the sources of revenue most productive and least unpopular, that body ought to provide and apply the means for the greatest and most costly works. 2. There would be cases where canals would be highly important in a national view, and not so in a local view. 3. Cases where, though highly important in a national view, they might violate the interest, real or supposed, of the state through which they would pass, of which an example might now be cited in the Chesapeake and Delaware canal, known to have been viewed in an unfavourable light, by the state of Delaware. 4. There might be cases where canals, or a chain of canals, would pass through sundry states,

since the canals were, for that era, the nearest equivalent of the railroads of a later age. Moreover, exclusion of the federal government from jurisdiction over the land and water routes within the country was not confined to the case of canals. An attempt by Madison to broaden the proposed canal amendments so that Congress might be able "to secure an easy communication between the States which the free intercourse now to be opened, seemed to call for,"²¹² without limitation to a particular mode, met with so little support that it was withdrawn without the taking of a record vote.

In any event, it was not the commerce clause which was thought of as related to the control of interstate highways and channels of communication, but rather that of establishing post offices and post roads. It was the latter that Franklin's proposed amendment was designed to supplement; and, in the only instance during the course of ratification where any apprehension was expressed lest the federal government might undertake to act in this field, the fear was expressly grounded on the postal clause, with no mention of the commerce clause.²¹³

SUMMARY AND CONCLUSION. For the first thirty years of its life the commerce clause was lost in silence, and since then it has been lost in words. It has not been missed, however, for the courts have supplied a fine large substitute; whereas the original now turns out to have been so small that it was naturally hard to keep track of.

Really, it was hardly more than a provision about a specialized aspect of foreign affairs. True, Congress was empowered to regulate commerce "between the several states" as well as that "with foreign nations." But the added grant, aside from its purely negative function of vetoing state-imposed barriers (and specifically fiscal barriers) to interstate trade, was substantially

and create a channel and outlet for their foreign commerce, forming at the same time a ligament for the Union, and extending the profitable intercourse of its members, and yet be of hopeless attainment if left to the limited faculties and joint exertions of the states possessing the authority"); same to Edward Livingston in 1824, *id.* 463; Hamilton's advice to Washington on the constitutionality of a national bank, *id.* 364.

²¹² Farrand (Madison) 615.

²¹³ Proceedings in the New York convention, 2 Elliott 406 ("To the clause respecting the establishment of post-offices, &c., Mr. Jones moved the following amendment:—"Resolved, as the opinion of the committee, that the power of Congress to establish post-offices and post-roads is not to be construed to extend to the laying out, making, altering, or repairing highways, in any state, without the consent of the legislature of such state.")

an individualized "necessary and proper" clause in aid of the power over external commerce.

The commerce power that the courts have given Congress is a rather formidable creation of indefinite extent which federalizes, so to speak, whatever it touches. The earlier one, that the constitution gave, was a mild, modest little power, confined to three tolerably concrete heads of jurisdiction—customs and fiscal regulation, navigation and maritime affairs, the conduct of large scale mercantile enterprise. Peripheral matters—the routes and channels of internal communication, internal police regulations determinative of whether and on what conditions articles of commerce might move between state and state, the establishment of a trustworthy medium of exchange—might be ever so intimately connected with commerce, but they were not commerce, and Congress had no power over them under, or by implication from, the commerce clause.

The constitution, like most other documents, was written not so much in the language of divination as in that of experience. Regulation of commerce—why, only yesterday parliament and the board of trade had been exercising the power of regulating the commerce of the colonies. That recollection lingered;²¹⁴ and may not one surmise that men were looking to that model, rather than to the dictionary or the as yet unwritten opinions of the as yet unappointed great chief justice in settling the ambit of congressional power?

THE GRANT TO CONGRESS AS A WITHDRAWAL FROM THE STATES

The content of the legislative jurisdiction intended to be given the federal government was only part of the picture. An equally significant part was the consequences upon the action of the states. Had the issue been clearly posed and unequivocally settled, it might perhaps have eliminated decades of judicial groping and guessing; and on the other hand it might have broken up the convention. At any rate it was not.

At the start of the convention, a few of the delegates—Read of Delaware,²¹⁵ Gouverneur Morris,²¹⁶ Butler of South Carolina

²¹⁴Letter of 1833, Madison to Rives, 3 Farrand 522; Essays (Winthrop) 97; cf. Pamphlets (Coxe) 136.

²¹⁵See 1 Farrand (Madison) 136, 202, id. (Yates) 141, 206, id. (King) 143.

²¹⁶See 1 Farrand (Paterson) 556.

(if his views as to representation should prevail, which they did not),²¹⁷ and notably Alexander Hamilton—²¹⁸ were quite ready to abolish the state governments entirely, at least as states, although Hamilton at least conceded that they would probably have to be retained as municipal corporations with subordinate power to enact ordinances.²¹⁹ Another small group, represented by Sherman and Luther Martin, conceived of the general government as “a sort of collateral government” to “secure the states in particular difficulties,”²²⁰ a government “to protect and secure the state governments,” empowered to act on anything of “an external and merely general nature,” with the states retaining their authority undiminished as to “whatever is internal and existing between the separate states and individuals.”²²¹ While neither of these opposing views was directly responsive to the question whether the grant of power to the federal government constituted a displacement of state authority in the fields designated, they both disclosed the existence of sympathies capable, if occasion should arise, of leading to a resolution of that shadowy problem—the first against, the second in favor of, the continued existence of power in the states despite the grant to Congress.

These views were in any event extreme and atypical. The more prevalent attitude might be phrased metaphorically, as by Dickinson in comparing the national government to the solar system with the states as planets revolving in their more or less independent orbits.²²² It was grounded in solid practical considerations. The “great extent” of the country rendered it essential that a substantial share of authority remain in the state governments.²²³ The states had different interests from each other and were ignorant of each other’s interests.²²⁴ The “great variety of

²¹⁷See 1 Farrand (King) 144.

²¹⁸Hamilton occupied almost the entire session of June 18 with an address urging the abolition of the states, except as organs for local legislation subject to supervision and veto by governors appointable by the federal executive, see 1 Farrand 281-311.

²¹⁹See 1 Farrand (Madison) 323.

²²⁰So characterized by Sherman, see 1 Farrand (King) 142, 143.

²²¹The language is that of Martin. 1 Farrand (Yates) 439, id. (King) 442; cf. id. (Madison) 437.

²²²1 Farrand (Madison) 153, id. (King) 159. This fancy seems to have caught the imagination of several of his colleagues, see Wilson’s remarks, id. (Madison) 153, 154, and those of Madison, id. (Madison) 165, id. (Yates) 169.

²²³This consideration was mentioned by Wilson, 1 Farrand (Madison) 154, and by Madison, id. (Madison) 357.

²²⁴See Gerry’s remarks, 1 Farrand (Madison) 166. The diversity and even divergence of interests between the states was also stressed by Bedford, 1 Farrand (Madison) 167, id. (Yates) 170, id. (King) 172.

objects" of governmental concern at one place and another in the several states precluded universal central control.²²⁵ In short, there was a lively awareness of the need for autonomous solution of special problems not common to all the people and territory to be governed, of that diversity in unity which is the basic predicate of federalism.

The character of the matters which the states could more appropriately handle, and as to which it would accordingly be wise to leave their authority unimpaired, was similarly a matter on which the delegates were in substantial agreement. While Randolph in the initial stages of the convention had listed as subjects with reference to which the existing government was incapable of producing "certain blessings," and which inferentially would fall within the proposed congressional power to legislate wherever the separate states were "incompetent," "the establishment of great national works—the improvement of inland navigation—agriculture—manufactures—a freer intercourse among the citizens,"²²⁶ and Hamilton had specified as the "three great objects of government," which could be secured only by a national government, "agriculture, commerce, and revenue,"²²⁷ these were isolated instances of specification of matters susceptible of federal control. The prevailing tendency here, as with respect to the grant of powers to the federal government, was to resort to characterization rather than specification. True, it was not very enlightening to describe the appropriate sphere for state action in terms of "subordinate" matters,²²⁸ or of "laws that were connected with the states themselves."²²⁹ On the other hand, the recurrent references to the states' powers in terms of "local" objects or concerns,²³⁰ and of control of their "internal police,"²³¹

²²⁵Referred to by Madison, 1 Farrand (Madison) 357, by Luther Martin, 4 id. 25; and see the brief notation of an objection by Mason, 1 Farrand (Hamilton) 160.

²²⁶1 Farrand (McHenry) 27.

²²⁷1 Farrand (Yates) 329.

²²⁸See the remarks of Wilson, 1 Farrand (Madison) 153, 154, id. (Yates) 328; of Hamilton, id. (Madison) 323, of King, id. (Madison) 492, and of Madison, id. (Madison) 357. Cf. Wilson's remarks at id. (King) 416 ("Certain inferior qualities . . . are the province" of the states.)

²²⁹Sherman's expression, see 1 Farrand (Pierce) 60.

²³⁰The epithet appears to have been used by Wilson, see 1 Farrand (Yates) 157, id. (Madison) 167; by Williamson, see id. (King) 171; by Luther Martin, see id. (Yates) 439; and by Baldwin, see id. (Madison) 470. Cf. Lansing's remarks on the Randolph plan as leaving with the states jurisdiction only over "the little local objects . . . which are not objects worthy of the supreme cognizance," id. (Madison) 249.

²³¹For the use of substantially this terminology to characterize the

did furnish a line of demarcation. The principle was clear enough. Federal and state legislative jurisdiction were to be complementary each of the other, the former extending to general or national cases or concerns, the latter to matters of local concern, matters which were nearly connected with the internal peace, order, and good government. As was to become apparent when their handiwork later came to be applied, this was one of those "general propositions (which) do not decide concrete cases."²³² The possibility of subjects which were in one aspect national or general, in another local, a matter of internal police, seems not to have presented itself to the minds of the framers and it pretty clearly did not get presented on the floor of the convention. Still, while they had not laid down a formula for the decision of particular cases, they had proclaimed a standard which might afford guidance if it were utilized. The rejection of Sherman's proposed amendment adding to the grant of legislative power, in matters which concerned the common interests of the union, a caveat against interference with the internal police of the several states²³³ can hardly be taken as outweighing the evidences set forth as to the assumptions regarding the power left in the states. Rather it would seem to have been regarded as in part redundant and unnecessary, and in part an improper stressing, in a section dealing with the powers granted to Congress, of the different though related subject as to the powers to be left in the states.

At best, however, this national-local dichotomy constituted, in so far as state powers were concerned, a policy or standard as to the general extent of state jurisdiction. It did not go to the question whether the particular powers to be given the federal government were regarded by the framers as wholly withdrawn

powers contemplated as remaining with the states, see the statements accredited to Wilson, 1 Farrand (Yates) 157, id. (King) 416; to Randolph, 2 id. (Madison) 26; to Williamson, 1 id. (Madison) 165, id. (King) 416; to Luther Martin, 1 id. (Yates) 439; and to Ellsworth, id. (Madison) 492. Cf. the choleric objection of Gouverneur Morris to Sherman's proposed amendment, 2 id. (Madison) 25 ("The internal police, as it would be called & understood by the states ought to be infringed in many cases, as in the case of paper money & other tricks by which citizens of other states may be affected."); also Madison's argument for a broad veto power in the federal government based on the asserted defects in the legislative system of the states, and the appropriateness of the power of the negative to "secure a good internal legislation and administration to the particular states," 1 id. (Madison) 318.

²³²Holmes, J., in *Lochner v. New York*, (1905) 198 U. S. 45, 76, 25 Sup. Ct. 539, 49 L. Ed. 937.

²³³Supra text and note 24.

from the ambit of state action, or whether they were deemed to remain in whole or in part with the states.

On this question, the proceedings in the early stages of the convention afford some, although rather meager and to an extent conflicting, evidence. When, at the very outset and without discussion, the committee of the whole approved the resolution to give the federal legislature "the legislative rights vested in Congress by the confederation,"²³⁴ a provision subsequently referred by the convention proper to the committee of detail with similar unanimity, it is fair to think that it intended to bestow not only the same heads of power as the congress of the confederation had, but powers possessing the same qualities or attributes. Limited though the number of such powers was, the terms of the grant in the articles had been that Congress should have "the sole and exclusive right and power" of acting as to the specified subjects.²³⁵ While it might be argued that the omission of like terminology from the legislative jurisdiction conferred by the constitution as it finally emerged represented a deliberate decision against giving authority to Congress in exclusion of the states, it would seem more probable that the convention, acting in awareness of the terms of the article and specifically directing the continuation of the powers therein conferred, intended, at least as to that class of matters, to make no substantial alteration in the location of legislative jurisdiction over the included subjects. Since those powers were interspersed through and, in some instances, such as the inclusion of the control over trade with the Indians in the commerce clause, even incorporated with the newly granted powers, it may similarly be supposed that it intended the latter to possess the same quality of exclusiveness, in the absence of differentiating language.

Much of what little light there is was shed by the discussions as to giving the central government a negative over state acts. While in general that important controversy lies outside the purview of our consideration, a brief statement of it is necessary. The Randolph plan had proposed giving the national legislature a veto power over state laws in its opinion "contravening . . . the articles of Union."²³⁶ This was amended, on Franklin's motion, to extend the power to laws in contravention of "any treaties

²³⁴Supra text and note 3.

²³⁵Articles of Confederation, article IX.

²³⁶Supra text and note 3.

subsisting under the authority of the union,"²³⁷ and in that form adopted by the committee of the whole. When it came before the convention for final action, Pinckney proposed and Madison supported a substitute provision, giving the federal government the negative as to "all laws which to them shall appear improper," without limitation as in the Randolph-Franklin clause to situations of repugnancy.²³⁸ The amendment was defeated decisively. Thereafter the Paterson plan was presented, totally omitting provisions for a negative on state legislation and thus differing markedly from that of Randolph, as Wilson pointed out in his parallel analysis of the two.²³⁹ The decision to adhere to the Randolph plan constituted a decision to retain the negative, just as the rejection of the Pinckney substitute had been an election of a limited, as against an unlimited, negative. All of this took place before the supremacy clause was included in the framework of the constitution, and—significantly, in view of the ardent sponsorship of the negative mainly by representatives of the larger states—before the compromise on equal representation in the senate. The day after that arrangement was announced, the provisions regarding the negative came up for consideration in their due order by the convention, to determine whether the clause should be referred to the committee of detail. The motion to refer was defeated by a vote of seven to three.²⁴⁰ By this time, however, the theory which was to find expression in the supremacy clause was taking shape; and when shortly thereafter the substance of that clause was moved for adoption by Luther Martin, it found lodgement in the constitution in place of the now-abandoned provision for a congressional negative.

All during this running controversy, there were intermittent casual remarks tending to shed light on the conceptions entertained by the framers as to the province left open for state legislation under the new system. Dickinson was firmly convinced that no boundary could be fixed between the legislative jurisdiction of states and nation, hence the unlimited negative should be given.²⁴¹

²³⁷1 Farrand (Journal) 47.

²³⁸1 Farrand (Journal) 162, *id.* (Madison) 164; *id.* (Yates) 169.

²³⁹See 1 Farrand (Wilson) 277, *id.* (Madison) 252, *id.* (Yates) 260; *id.* (King) 265, *id.* (Hamilton) 269.

²⁴⁰2 Farrand (Journal) 22. A renewed attempt to introduce the federal negative, confined to laws "interfering . . . with the general interests and harmony of the Union," upon a two-thirds vote by Congress, was brought forward and defeated in the closing weeks of the convention, *id.* (Journal) 382.

²⁴¹1 Farrand (Madison) 167, *id.* (King) 172.

Since the side of the boundary which would be protected by such a measure was that of the federal power, he seems to have assumed that the states could and would legislate on matters falling within the scope of the federal grant, and to have been willing to confide in the restraining action of the national legislature rather than in any inherent want of power as the means of opposing such enactments. Others of the delegates advanced similar notions when it suited their convenience for purposes of argument;²⁴² but since some, at least, who did so, on other occasions took the exactly contrary position, that the line was susceptible of definition,²⁴³ no great weight can be attached to their declarations. Luther Martin stated more positively that the respective jurisdictions of state and nation were capable of delimitation; in his remarks, the assumption that state action within the carefully defined limits of power bestowed on the federal government would constitute a prohibited trespass on the latter's jurisdiction, and vice versa, lay very close to the surface.²⁴⁴

These are dangerous materials on which to rely, however, since the statements were all made while their proponents were in passionate pursuit of a controverted point. More revealing are the incidental expressions employed in the general course of discussion. Thus, Butler spoke with apprehension of "taking away the rights of the states," when discussing the scope of the Randolph-plan grant of power to the federal legislature.²⁴⁵ King, on the same topic, described that grant as having to do with the power "given up by the people . . . to the federal government."²⁴⁶ Wilson spoke of the states as being "restrained" to local purposes.²⁴⁷ Lansing declared that the Randolph plan "absorbs" the powers of the states save in certain municipal affairs of negligible importance.²⁴⁸ King again, in supporting the Randolph plan, while disclaiming any desire to obliterate the states, "thought that much

²⁴²See the remarks of Pinckney, 1 Farrand (Madison) 164; of Wilson, id. (Madison) 166; of Madison, id. (Yates) 169; of Hamilton, id. (Madison) 323; and of Sherman, 2 id. (Madison) 25.

²⁴³Compare the arguments of Wilson, 1 Farrand (King) 416, with those cited *supra* n. 242.

²⁴⁴1 Farrand (Yates) 439 ("Many who wish the general government to protect the state governments are anxious to have the line of jurisdiction well-drawn and defined, so that they may not clash. This suggests the necessity of having this line well detailed—possibly this may be done.")

²⁴⁵1 Farrand (Madison) 53.

²⁴⁶1 Farrand (Pierce) 60.

²⁴⁷1 Farrand (Madison) 137.

²⁴⁸1 Farrand (Madison) 249.

of their power ought to be taken from them."²⁴⁹ Sherman observed on the difficulty of specifying the line between the powers to be given the general government and "those to be left with the states."²⁵⁰ Gouverneur Morris regarded the existence of a federal negative over state laws as unnecessary "if sufficient Legislative authority should be given to the genl. government."²⁵¹

Concededly, each of these statements is in itself a trifle. Their significance lies in the uniformity of their tendency, rather than in the intrinsic strength of any single expression. They are straws which show which way the ideological wind was blowing. Surrender, limitation, reduction of state powers, that is the common suggestion in all these snatches of language unguardedly employed without deliberate purpose of stating an argument. Examination of the records in this early stage discloses not a single instance of the use of words containing a counter-suggestion that fields of action were being opened up in which either Congress or the states, in appropriate circumstances, might legislate. Considered together with the grant of power as to subjects of congressional action under the articles, perhaps also with the fact that the proposed federal negative extended only to state laws contravening the "articles of union" and treaties, and not like the supremacy clause to vindicate the dignity of the federal Constitution, *laws*, and treaties, the united effect of these collateral expressions demonstrates, it is submitted, that the delegates were thinking in terms of grants of jurisdiction to the federal government which would exclude state power on the same subjects.²⁵²

Upon the submission of the constitution to the people, this undertone of harmony disappeared. In some quarters, the discussion still proceeded on the basis that there was no overlapping of jurisdiction. The picture drawn was that of a grouping of powers into mutually exclusive categories, the one composed of those matters as to which authority was to be conferred on the general gov-

²⁴⁹1 Farand (Madison) 324.

²⁵⁰2 Farrand (Madison) 25.

²⁵¹2 Farrand (Madison) 27.

²⁵²The same thought seems to underlie the interchange between Gerry and Pinckney in discussing the proposed unlimited veto power (see 1 Farrand (Yates) 170), specifically in its application to existing state legislation, in which after the former had expressed his opinion that the power of the negative would probably apply to such laws and that consequently the limited negative would seem preferable, the latter rejoined that "the proposed amendment had no retrospect to the state laws already made. The adoption of the new government must operate as a complete repeal of all the constitutions and state laws, so far as they are inconsistent with the new government."

ernment, the other of matters as to which authority should remain with the states.²⁵³ This was, in effect, a reiteration of the early views just examined as to the scope and scheme of the new government.

Another view of quite the contrary tenor was also being expressed, however. Of this, perhaps the best exemplar is Hamilton's celebrated analysis in the thirty-second number of the *Federalist*. There he said:

. . . As the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively *delegated* to the United States. This exclusive delegation, or rather this alienation, of state sovereignty, would only exist in three cases; where the constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction of repugnancy in point of constitutional authority.²⁵⁴

A similar sentiment was expressed by the same writer on another occasion,²⁵⁵ and the same approach was taken by two pro-constitution delegates in the Virginia ratifying convention, of whom one was the young John Marshall.²⁵⁶ Here, then, is plain conflict,

²⁵³Letter of Sherman and Ellsworth to the governor of Connecticut, 3 Farrand 99 ("Some additional powers are vested in congress, which was a principal object that the states had in view in appointing the convention. Those powers extend only to matters respecting the common interests of the union, and are specially defined, so that the particular states retain their sovereignty in all *other* matters."); letter of October 24, 1787, Madison to Jefferson, id. 132 ("The great objects which presented themselves were . . . 2. to draw a *line of demarkation* which would *give to the general government* every power requisite for general purposes, and *leave to the states* every power which might be most beneficially administered by them. . ."): Essays (Sherman) ("The powers vested in the federal government are clearly defined, so that each state still retains its sovereignty in what concerns its own internal government, and a right to exercise *every power* of a sovereign state *not particularly delegated* to the government of the United States. The new powers vested in the United States are, to regulate commerce (etc.) . . .") (Italics supplied.)

²⁵⁴At p. 152.

²⁵⁵*Federalist*, No. 82, 420.

²⁵⁶Nicholas, 3 Elliott 391; Marshall, id. 419 ("The truth is, that when power is given to the general legislature, if it was in the state legislature

with the greater number of statements on the one side, and the greater articulateness of statement on the other.

The question of exclusiveness or concurrency of state and federal powers in general is difficult of resolution, but happily we need not resolve it. Hamilton was addressing his remarks to the questions of taxation and of the jurisdiction of the federal courts, while the Virginians were discussing control of the militia. Even should their analysis be accepted and the statements opposed to it rejected, there remains the question whether "authority in the states" to regulate commerce "would be absolutely and totally contradictory and repugnant" to the grant of the commercial power to Congress.

Sherman, at least, seems to have thought the contrary, with his declarations on one occasion in the convention that "the states will never give up all power over trade,"²⁵⁷ on another that the supremacy clause would render the existence of a concurrent power in the states harmless.²⁵⁸ These statements are difficult to reconcile, however, with his commitments to the general proposition that the areas of state and federal action were mutually exclusive.²⁵⁹ Bedford in the early days of the convention was astute to preserve to the states some measure of autonomous action with respect to matters affecting their commercial interests.²⁶⁰ It seems likely from the context of his remarks, however, that he contem-

before, both shall exercise it; unless there be an incompatibility in the exercise by one to that by the other, or negative words precluding the state government.") See also Pamphlets (Hanson) 251, suggesting that the only limitations on state action are those expressed in art. I, sec. 10.

²⁵⁷2 Farrand (Madison) 361.

²⁵⁸2 Farrand (Madison) 625 ("Mr. Sherman. The power of the United States to regulate trade being supreme can control interferences of the state regulations when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction.")

²⁵⁹*Supra*, note 253.

²⁶⁰His statements were made prior to the particularization of the broad powers given by the Randolph plan, and hence prior to the commerce clause, so that they cannot be regarded as addressed directly to that grant. They occurred in the course of the discussion of the proposed federal negative on state laws which he then opposed. He is quoted somewhat differently in the three versions of his address and the relevant portions of each account are here set out. ". . . Delaware would have about 1/90 for its share in the general councils, whilst Pa. & Va. would possess 1/3 of the whole. Is there no difference of interests, no rivalry of commerce, of manufacturers? Will not these large states crush the small ones whenever they stand in the way of their ambitious or interested views? This shows the impossibility of adopting such a system as that on the table . . .," 1 Farrand (Madison) 165. "Mr. Bedford was against the motion, and states the proportion of the intended representation 90: Delaware 1—Pennsylvania and Virginia one third. On this computation where is the weight of the small states when the interest of the one is in competition with the other on trade, manufactures, and agriculture?" *id.* (Yates) 170. "When the system of equal representation obtains Delaware

plated only the retention of independent power to encourage local industries by bounties and similar devices,²⁶¹ a view which was shared by a number of his colleagues,²⁶² although as strenuously resisted by others.²⁶³ If that is the interpretation to be given his remarks, they are, of course, beside the point, because they do not refer to anything within the bounds of "commerce," as that term was understood in connection with the grant to Congress. Except for these distinctly dubious instances, there is no evidence that any one desired or expected that the states would retain any authority so far as the specific subject of regulation of commerce was concerned.

The statements scattered throughout the course of the discussion to the effect that, as to commercial regulation, Congress would or should be given "full power,"²⁶⁴ "absolute control,"²⁶⁵ and the like²⁶⁶ look in the opposite direction. Still, they are too ambiguous to support without more the proposition that Congress and Congress alone should have the power of commercial regulation, being on their face equally susceptible to the construction that there should be no aspect of commercial regulation withheld from the federal government.

Some at least of the delegates seem to have gone to Philadelphia firmly committed to the project of securing for the general government the entire regulation of commerce, depriving the states of all participation in that field.²⁶⁷ In accordance with this

will be 1/90th—Virginia and Pennsylvania will stand 28/90th—Suppose a rivalry in commerce or manufactures between Delaware and these two states; what chance has Delaware agt. them? Bounties may be given in Virginia & Pennsylvania, and their influence in the genl. govt. or legislature will prevent a negative, not so if the same measure is attempted in Delaware," *id.* (King) 172.

²⁶¹See *supra*, note 260.

²⁶²See statements of Gerry, 1 Farrand (King) 171-2; of Mason, 2 *id.* (Madison) 441; and of Clymer and King, 2 *id.* (Madison) 442.

²⁶³See, e.g., Madison's remarks at 2 Farrand (Madison) 441.

²⁶⁴See, e.g., the language of the Rhode Island merchants' address to the convention, 3 Farrand 19.

²⁶⁵Monroe in the Virginia convention, 3 Elliott 214; McMaster (*Centinel*) 570.

²⁶⁶E.g., letter of Carrington to Jefferson, 3 Farrand 38 ("full and independent authority"); Pinckney in the *Observations on the Plan of Government*, 3 *id.* 116; *Essays* (Winthrop) 108 ("unlimited power"); see address of the minority of the Pennsylvania legislature, McMaster 79 ("entire jurisdiction over maritime affairs.")

²⁶⁷Letter of French charge d'affaires to the French foreign minister, June 10, 1787, 3 Farrand 41, 42 ("Les Etats seront surtout privés de la faculté de faire aucun régleme[n]t de commerce ou de statuer sur aucun objet relatif au droit des gens et le Congrès se réservera exclusivement cette branche de législation. . . . Les députés, Monseigneur, qui m'ont communiqué ces différens projets, sont déterminés à les soutenir avec vigueur dans l'assemblée de Philadelphie. . . .")

purpose, the Pinckney plan expressly proposed to give Congress the "exclusive" power to regulate trade;²⁶⁸ and similar language appears in the draft prepared by Wilson as a member of the committee on detail.²⁶⁹ Its absence from the constitution as ultimately presented for approval is more probably to be ascribed to a feeling that insertion was unnecessary than to any alteration in the purpose of the delegates. Madison's declaration, in the closing days of the convention, that he "was more and more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority,"²⁷⁰ is the most unequivocal expression in support of the doctrine of exclusiveness after the constitution had assumed its final form. Others, however, went on record to the effect that the federal government ought in the general interest to have the sole say-so in the field of commercial regulation.²⁷¹ Still others, without committing themselves to what should be done, did register their opinion that the states were in fact surrendering the entire field to Congress.²⁷² Moreover, there was fairly widespread expression of the view that the states were incompetent to legislate in the field, whether because their action would be ineffectual or because it would not be disinterested.²⁷³ That those holding this latter opinion, all of them partisans of the constitution, were not contemplating the retention of the power by a body not qualified to exercise it seems a legitimate inference; hence, it seems fair to group them with those who interpreted the constitution as withdrawing all power over commerce from the states.

²⁶⁸2 Farrand 135; 3 *id.* 607.

²⁶⁹2 Farrand 159.

²⁷⁰2 Farrand (Madison) 625.

²⁷¹Langdon objected to giving the states any power with respect to regulation of tonnage, on the ground that it "was an essential part of the regulation of trade, and that the states ought to have nothing to do with it." (*loc. cit. supra*, n. 270). In the Observations on the Plan of Government, Pinckney adverted to the good fiscal consequences to be anticipated from "the surrendering to the Federal Government, the complete management of our commerce." (3 Farrand 116). See Pamphlets (Lee) 287, for an instance where a warm opponent of the constitution nevertheless supported the grant of exclusive commercial power.

²⁷²Tyler in the Virginia convention, 3 Elliott 639; Lowndes in the South Carolina legislature, 4 *id.* 273 (*semble*). Essays (Winthrop) 79, lists, as one of the two major items of complaint against the confederation, "that Congress has not the sole power to regulate the intercourse between us and foreigners," and seems to assume that it is granted power of that character by the constitution.

²⁷³See the remarks of Livingston in the New York convention, 2 Elliott 214, 384; of Yeates in the Pennsylvania convention, McMaster 297; Essays (Ellsworth) 141.

Two other bits of evidence tend to corroborate the view that the convention intended, in granting the commerce power to Congress, to exclude the states from legislating upon the subjects included under it. One, of course, is the inclusion of the power over Indian commerce in the same clause and in like language. This, it will be recalled, was a power substantially equivalent to one possessed by congress under the articles of confederation and, like other powers conferred by that instrument, was expressly made exclusive. But for its independent origin and late incorporation in the commerce clause, this would seem well nigh conclusive of the exclusiveness of all the powers given by that clause. As it is, that much can not be claimed for it. But it does seem proper that its presence and form should at least be weighed with all the other evidence tending to settle the character of the commerce power as exclusive or concurrent.

Again, it is hard to understand why there should have been quite such strenuous opposition to the proposal to require an extraordinary majority for commercial regulations, if the several "commercial" states could in any event legislate as freely for their protection as under the existing system. True, their representatives wished active encouragement for the shipping industry and so would doubtless have opposed the amendment even had they thought it left them in status quo. They did not think this, however. Instead they believed its effect would be to strip them of what weapons they had without supplying an adequate substitute, as witness Clymer's prediction that "the northern and middle states [would] be ruined, if not enabled to defend themselves against foreign regulations,"²⁷⁴ and Gorham's protest that, should the amendment carry, the Eastern states in joining the union would "thereby tie their own hands from measures which they could otherwise take for themselves."²⁷⁵ Here again would seem to be collateral support for the conclusion that the intention was to withdraw the regulation of commerce from state cognizance altogether.

On the whole, the evidence supports the view that, as to the restricted field which was deemed at the time to constitute regulation of commerce, the grant of power to the federal government presupposed the withdrawal of authority *pari passu* from the states. Against this conclusion there stand the general explana-

²⁷⁴ Farrand (Madison) 450.

²⁷⁵ Farrand (Madison) 453.

tions as to concurrency in other connections and statements of somewhat uncertain weight and relevancy by two delegates, at least arguably presupposing a measure of concurrent power as to commercial regulation. In support of it are a considerable number of instances early in the convention stressing the dichotomy of state and federal power, a smaller number of statements of like tenor after the convention adjourned, a few clear declarations favoring the exclusive interpretation of the commerce clause specifically, as well as other utterances which stressed its completeness or the incapacity of the states to act in this area; the nature and form of the grant of power over the Indian trade; and the sentiments expressed in opposing the proposal to require extraordinary majorities for regulations of commerce.

While in its content the commerce clause was designed to include only a limited number of matters, the states could no more legislate with propriety as to any subjects falling within its limits than Congress could as to subjects falling outside them. Customs regulation, maritime regulations, and the conduct of the more awesome types of mercantile enterprise, in other words, was the private preserve of Congress on which the states might not presume to poach.